



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

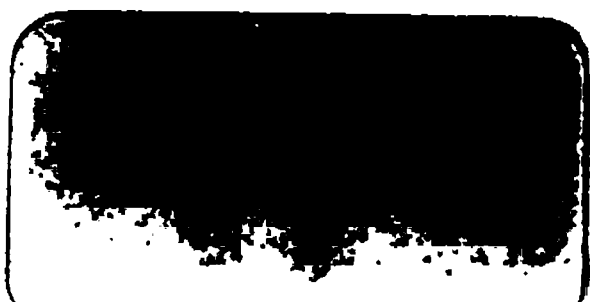
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



**HARVARD LAW SCHOOL
LIBRARY**



June 20

44

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. LIII.

CONTAINING THE CASES DECIDED AT THE MAY TERM, 1876,
NOT PUBLISHED IN VOL. LII., AND CASES DECIDED
AT THE NOVEMBER TERM, 1876.

INDIANAPOLIS:
INDIANAPOLIS PUBLISHING HOUSE,
PRINTERS AND BINDERS.
1877.

Entered according to the act of Congress, in the year 1877, by
JAMES B. BLACK,
In the office of the Librarian of Congress, at Washington.

Rec. May 29, 1877

ELECTROTYPED AT THE
INDIANAPOLIS ELECTROTYPE
FOUNDRY.

KETCHUM & WANAMAKER.

TABLE OF THE CASES

REPORTED IN THIS VOLUME.

Abbott, Auditor, et al. v. Edger- ton.....	196	Bottorff v. Wise	32
Abshire et al. v. The State, ex rel. Wilson et ux.....	64	Bowers et al. v. Bowers.....	430
Alford et al. v. Baker et al.....	279	Braden, The Logansport, etc., R. W. Co. v.....	234
Allen, Bonnell v.....	130	Bradley, The Board of Comm'rs, etc., v.....	422
Alter, Nowels v.....	18	Bradley v. The Brandywine, etc., Turnpike Co.....	70
Arbuckle et al. v. McCoy.....	63	Brown et al. v. Keyser.....	85
Armstrong et al. v. Rockwood...	506	Brant et al., Watkins v.....	208
Arnold et al., O'Conner v.....	203	Bryant v. Hoskins et al.....	218
Bacon v. The Western Furniture Co.....	229	Bryson, Adm'r, v. Kelley.....	486
Baker et al., Alford et al. v.....	279	Bucklen v. Huff	474
Baker v. The Board of Comm'rs, etc.....	497	Burbank et al. v. Slinkard et al...	493
Baltimore, etc., R. W. Co. v. The New Albany, etc., R. R. Co. et al.	597	Busenbarke, Ex'r, v. Ramey et al.	499
Barnaby et al. v. Parker.....	271	Butler, The Grover & Baker, etc., Co. v.....	454
Bartholomew et ux., Shannon v..	54	Cabel et al. v. McCafferty et al...	75
Beath, Cleavenger et al. v.....	172	Carver v. Carver.....	241
Beeber et al., Marshall v.....	83	Caven, The Indianapolis, etc., Co. et al. v.....	258
Beeber, Marshall v.....	119	Chamness v. Chamness.....	301
Begue, Woodward v.....	176	Cincinnati, etc., R. R. Co. v. Ea- ton, Adm'r.....	303
Bell v. The Indianapolis, etc., R. R. Co.....	57	City of Indianapolis, Dailey v....	488
Bender v. The State.....	254	City of Logansport, Tuley v.....	507
Birth, Shepard et al. v.....	205	Clapper et al., Dutton v.....	276
Bissot v. The State.....	408	Cleavenger et al. v. Beath.....	172
Blackwell v. Ketcham	184	Clifford et al., The Town of Cice- ro v.....	191
Blessing v. Dodds.....	95	Clough et al. v. Miller et al.....	28
Board of Comm'rs, etc., Baker v..	497	Clough et al. v. Thomas et al.....	24
Board of Comm'rs, etc., v. Bradley.	422	Collier, Todd v.....	122
Board of Comm'rs, etc., Driskill v.	532	Colman v. De Wolf.....	428
Board of Comm'rs, etc., Hanlon v.	123	Compton, Wright et al. v.....	337
Board of Comm'rs, etc., et al., Meeker et al. v.....	31	Conaway et al., Knarr et al. v....	120
Board of Comm'rs, etc., et al., Meeker et al. v.....	173	Conover et al. v. Stringer.....	248
Boaz v. McChesney	193	Cox v. Harvey.....	174
Boland, The Louisville, etc., R. W. Co. v.....	398	Craig, Adm'x, Krutz v.....	561
Booker et al., Ford v.....	395	Crim v. Fitch.....	214
Bonnell v. Allen.....	130	Dailey v. The City of Indianapo- lis.....	483
		Davis, Adm'r, Mullikin v.....	206
		Dawkins v. Kions.....	164

Decker v. The State, ex rel. Harrell.....	552	Heaton, Hancock v.....	111
Denbo v. Wright, Adm'r.....	226	Heaton v. Knowlton et al., Adm'rs.....	357
De Wolf, Colman v.....	428	Heilman, Krach et al. v.....	517
Dickerson, Grose v.....	460	Helwig v. Jordan.....	21
Dickson et al., Mitchell v.....	110	Henderson, Aud., etc., v. The State, ex rel. Overman.....	60
Dietrick, Ingerman v.....	9	Higert v. The Trustees of Ind. Asbury Univer.....	326
Dodds, Blessing v.....	95	Hight et ux. v. Langdon.....	81
Dodge v. Gaylord et al.....	365	Holloway v. The State.....	554
Doerr et al., Weathers et al. v....	104	Horrell, The Indianapolis Sun Co. v.....	527
Driskill v. The Board of Comm'rs, etc.....	532	Hoskins et al., Bryant v.....	218
Dutton v. Clapper et al.....	276	Huff, Bucklen v.....	474
Eagan v. The State.....	162	Hunt et al. v. The State, ex rel. Martin et ux.....	321
Eaton, Adm'r, The Cincinnati, etc., R. R. Co. v.....	307	Hutzell, The State v.....	160
Edgerton, Abbott, Aud., et al. v..	196	Ihinger v. The State.....	251
Edwards et al. v. Haverstick, Adm'r.....	348	Indiana Central Canal Co. v. The State.....	575
Elliott et al., Taylor v.....	441	Indianapolis, etc., R. R. Co., Bell v.....	57
Emily v. Harding.....	102	Indianapolis, etc., R. R. Co. v. Stout, Adm'r.....	143
Ensign, Wolcott v.....	70	Indianapolis Piano, etc., Co. et al. v. Caven.....	258
Evans v. White, Adm'r.....	1	Indianapolis Sun Co. v. Horrell.....	527
Everett v. Gooding.....	72	Ingerman v. Dietrick.....	9
First Nat'l Bank, Sherlock et al. v.	73	Jackson et al. v. Reeves.....	231
First Nat'l Bank et al., McCormack v.....	466	Jackson et al., v. Reeves.....	343
Fitch, Crim v.....	215	Johnson, The Trustees of, etc., of Wolcott v.....	273
Ford v. Booker et al.....	395	Jones v. The State.....	235
Franklin College, Vawter v.....	88	Jordan, Helwig v.....	21
Franklin College, Whitesides v....	93	Kelley v. The State.....	311
Franklin Life Ins. Co. v. Sefton, Adm'r, et al.....	380	Kelley, Bryson, Adm'r, v.....	486
Fries, The State v.....	489	Kelsey et al., McCrea v.....	69
Frost et al. v. Tarr et ux.....	390	Kennedy et al., Modlin et ux. v.	267
Gaylord et al., Dodge v.....	365	Kennedy v. The State.....	542
George, The State v.....	434	Kent et al., The State, ex rel. Logansport National Bank, v....	112
Gibson et al., Widup v.....	484	Kestner v. Sprath et al.....	288
Gilpin v. Wilson.....	443	Ketcham, Blackwell v.....	184
Godman et al. v. Meixsel et al....	11	Keyser, Brown et al. v.....	85
Gooding, Everett v.....	72	Kions, Dawkins v.....	164
Greer v. The State.....	420	Kitch et al. v. The State, ex rel. Johnson.....	59
Gregory v. Latchem et al.	449	Knarr et al. v. Conaway et al.....	120
Grinestaff et al. v. The State.....	238	Knowlton et al., Adm'rs, Heaton v.....	357
Grinstead, Rose v.....	202	Krach et al. v. Heilman.....	517
Grose v. Dickerson.....	460	Krutz v. Craig, Adm'x.....	561
Grover & Baker, etc., Co. v. Butler.....	454	Langdon, Hight et ux. v.....	81
Hackney, The Pittsburgh, etc., R. W. Co. v.....	488	Latchem et al., Gregory v.....	449
Hamilton, Wheat v.....	256	Lichtenfels v. The State.....	161
Hancock v. Heaton.....	111	Logan v. Marquess.....	16
Hanlon v. Board of Comm'rs of Floyd Co.....	123	Logansport, etc., R. W. Co. v. Braden.....	234
Hannum, The State v.....	335	Louisville, etc., R. W. Co. v. Boland.....	398
Harding, Emily v.....	102		
Harris v. Rivers et al.....	216		
Harvey, Cox v.....	174		
Haverstick, Adm'r, Edwards et al. v.....	348		

TABLE OF CASES REPORTED.

v

Love et al. v. Miller et al.....294	Shannon v. Bartholomew et ux... 54
Mack et al., Wolcott et al. v.....269	Shelton v. The State, ex rel. The
Marion Township Gravel Road	Board of Commissioners, etc....331
Co. v. Sleeth, Treas..... 35	Shepard et al. v. Birth.....105
Marquess, Logan v..... 16	Sherlock et al. v. The First Nat.
Marshall v. Beeber et al..... 83	Bank..... 73
Marshall v. Beeber.....119	Shook et al. v. The State, ex rel.
Mattler v. Schaffner et ux.....245	McCampbell.....403
Maxwell v. Maxwell.....363	Sleeth, Treas., The Marion T'p
McCafferty et al., Cabel et al. v... 75	Gravel Road Co. v..... 35
McChesney, Boaz v193	Slinkard et al., Burbank et al. v..493
McCormack v. The First National	Smith, McMannus et al. v.....211
Bank, etc., et al.....466	Spath et al., Kestner v.....288
McCormick et al. v. Spencer.....550	Spencer, McCormick et al. v.....550
McCoy, Arbuckle et al. v..... 63	State, The, Bender v.....254
McCrea v. Kelsey et al..... 69	State, The, Bissot v.....408
McDonough, The Toledo, etc., R.	State, The, Eagan v.....162
W. Co. v.....289	State, The, v. Fries.....489
McMannus et al. v. Smith.....211	State, The, v. George.....434
Meeker et al. v. The Board of	State, The, Greer v.....420
Commissioners, etc., et al..... 31	State, The, Grinestaff et al. v.....238
Meeker et al. v. The Board of	State, The, v. Hannum.....335
Commissioners, etc., et al.....173	State, The, Holloway v.....554
Meiners v. Munson.....138	State, The, v. Hutzell160
Meixsel et al., Godman et al. v... 11	State, The, Ihinger v.....251
Miller et al., Clough et al. v..... 28	State, The, Jones v.....235
Miller et al., Love et al. v.....294	State, The, Kelley v.....311
Mitchell v. Dickson et al.....110	State, The, Kennedy v.....542
Modlin et ux. v. Kennedy et al...267	State, The, Lichtenfels v.....161
Montgomery et al. v. The State,	State, The, Raincy v.....278
ex rel. Southard.....108	State, The, The Indiana Central
Morford v. White.....547	Canal Co. v.....575
Morgan et al. v. Olvey et ux..... 6	State, The, v. Throckmorton.....354
Mullikin v. Davis, Adm'r.....206	State, The, White v.....595
Munson, Meiners v.....138	State, The, Wolf v..... 30
New Albany, etc., R. R. Co. et al.,	State, The, Wolfington et al. v...343
The Baltimore, etc., R. W. Co. v..597	State, The, v. Zimmerman et al...360
Nichol v. Thomas..... 42	State, ex rel. Brooks, Sample v... 28
Nowles v. Alter..... 18	State, ex rel. Converse, Young v..536
O'Conner v. Arnold et al.....203	State, ex rel. Harrell, Decker v...552
Olvey et ux., Morgan et al. v..... 6	State, ex rel. Johnson, Kitch et
Parker, Barnaby et al. v.....271	al. v..... 59
Parks v. Zeek.....221	State, ex rel. Martin et ux., Hunt
Pittsburgh, etc., R. W. Co. v.	et al. v.....321
Hackney488	State, ex rel. McCampbell, Shook
Powell v. Powell.....513	et al. v.....403
Quigley v. Thompson.....317	State, ex rel. Overman, Hender-
Rainey v. The State.....278	son, Auditor, etc., v..... 60
Ramey et al., Busenbarke, Ex'r,v.499	State, ex rel. Southard, Mongom-
Reed v. Trentman et al.....438	ery et al. v.....108
Reeves, Jackson et al. v.....231	State, ex rel. The Board of Com-
Reeves, Jackson et al. v.....343	missioners, etc., Shelton v.....331
Rivers et al., Harris v.....216	State, ex rel. The Logansport
Rockwood, Armstrong et al. v...506	National Bank, v. Kent et al....112
Rose v. Grinstead.....202	State, ex rel. Wilson et ux.,
Sample v. The State, ex rel.	Abshire et al. v..... 64
Brooks..... 28	Stout, Adm'r, The Indianapolis,
Schaffner et ux., Mattler v.....245	etc., R. R. Co. v.....143
Sefton, Adm'r, et al., The Frank-	Stringer, Conover et al. v.248
lin Life Ins. Co. v.....380	Tarr et ux., Frost et al. v.....390

Taylor v. Elliott et al.....	441	White, Adm'r, Evans v.....	1
Taylor, Tucker v.....	93	White, Morford v.....	547
Thomas et al., Clough et al v.....	24	White v. The State.....	595
Thomas, Nichol v.....	42	Whitesides v. Franklin College...	93
Thompson, Quigley v.....	317	Widup v. Gibson et al.....	484
Throckmorton, The State v.....	354	Williams et al. v. Venner et al....	396
Todd v. Collier.....	122	Wilson, Gilpin v.....	443
Toledo, etc., R. W. Co. v. McDon-		Wilson, Wingate v.....	78
ough	289	Wingate v. Wilson.....	78
Town of Cicero v. Clifford et al...	191	Winings v. Wood.	187
Trentman et al., Reed v.....	438	Wise, Bottorff v.....	32
Trustees of, etc., of Wolcott v.		Wolcott v. Ensign.....	70
Johnson	273	Wolcott et al. v. Mack et al.....	269
Trustees of Ind. Asbury Univer-		Wolf v. The State.....	30
sity, Higert v.....	326	Wolffington et al. v. The State....	343
Tucker v. Taylor.....	93	Wood, Winings v.....	187
Tuley v. The City of Logansport.	508	Woodward v. Begue.....	176
Vawter v. Franklin College.....	88	Wright, Adm'r, Denbo v.....	226
Venner et al., Williams et al. v...	396	Wright et al. v. Compton.....	337
Watkins v. Brunt et al.....	208	Young v. The State, ex rel. Con-	
Weathers et al. v. Doerr et al.....	104	verse	536
Western Furniture Co., Bacon v..	229	Zeek, Parks v.....	221
Wheat v. Hamilton	256	Zimmerman et al., The State v...	360

TABLE OF THE CASES

CITED IN THIS VOLUME.

Acey v. Fernie , 7 M. & W. 150....389	Barickman v. Kuykendall , 6
Adams v. Cosby , 48 Ind. 153.....304	Blackf. 21.....574
Adams v. Pearson , 7 Pick. 341...374	Barnard v. Monnot , 40 N. Y. (3
Adams v. The Board, etc. , 46 Ind.	Keyes) 203.....300
454130	Barnes v. Barlett , 47 Ind. 98.....272
Adams v. Wilson , 12 Met. 138....225	Barnes v. Loyd , 37 Ind. 523..... 66
Addleman v. Erwin , 6 Ind. 494...569	Barnes v. The State , 28 Ind. 82..544,
Akerly v. Vilas , 24 Wis. 165.....374	545
Alexander v. Thomas , 25 Ind. 268.531	Barney v. Saunders , 16 How. 535.333
Allen v. Anderson , 44 Ind. 395...272	Bartholomew v. Leech , 7 Watts,
Allen v. Randolph , 48 Ind. 496...217	472.....333
Allis v. Billings , 6 Met. 415..... 53	Bartholomew v. Loy , 44 Ind. 393.220
Amer. Ins. Co. v. Canter , 1 Pet.	Baxter v. Pickett's Adm'r , 27 Ind.
511.....369	490.....243
Anderson v. Tannehill , 42 Ind.	Beard v. Beard , 21 Ind. 321.....470
141..... 66	Bearss v. Montgomery , 46 Ind. 544.110
Andress v. The State , 3 Blackf. 108.240	Beaumont v. Boulton , 7 Ves. 599..333
Andrews v. Spurlin , 35 Ind. 262..251	Beckner v. Carey , 44 Ind. 89.....482
Armstrong v. B'd of Comm'rs, etc. ,	Bell's Adm'x v. Golding , 27 Ind.
4 Blackf. 208..... 41	173.....591
Arnold v. Richmond Iron Works ,	Bell v. Hewett's Ex'rs , 24 Ind.
1 Gray, 434..... 53	280.....392, 393
Aspinwall v. B'd of Comm'rs, etc. ,	Bell v. Smith , 7 D. & R. 846; 5
18 Ind. 372..... 32	B. & C. 188.....320
Atkinson v. Allen , 29 Ind. 375 ...388	Bell v. The State , 42 Ind. 335....556
Aurora, etc., Co. v. Holthouse , 7	Bellows v. Rosenthal , 31 Ind. 116. 67
Ind. 59..... 41	Berkshire v. Young , 45 Ind. 461..469
Bailey v. Mason , 4 Minn. 546..... 41	Berry v. Anderson , 22 Ind. 36...186,
Bailey v. Mayor, etc. , 3 Hill, 531. 41	205
Baker v. B'd of Comm'rs, etc. , 53	Bertsch v. Lehigh, etc., Co. , 4
Ind. 497.....533	Rawle, 130.....591
Baldwin v. Elphinston , 2 Wm. Bl.	Blakely v. The State , 52 Ind. 161.344
1037.....530	Bloomer v. Stolley , 5 McLean,
Baldwin v. Kerlin , 46 Ind. 426...272,	158..... 41
591	Blunt v. Aikin , 5 Wend. 522..... 2.,
Ball v. Clark , 15 Ind, 370.....101	Boardman v. Griffin , 52 Ind. 101..192,
Baltimore, etc., R. R. Co. v. Lan-	229
sing , 52 Ind. 229.....304	Board of Comm'rs, etc., v. Coates ,
Bank, etc., v. Beverly , 1 How.	17 Ind. 150.....545
134.....369	Board of Comm'rs, etc., v. Ford ,
Baptist Church v. Brooklyn, etc. ,	27 Ind. 17.....303
Co. , 28 N. Y. 153.....387	Board of Comm'rs, etc., v. Greg-
Barber v. Slade , 30 Vt. 191..... 68	ory , 42 Ind. 32.....428

Board of Comm'rs, etc., v. Harrington, 1 Blackf. 260.....	498	Campbell v. Routt, 42 Ind. 410...213	
Board of Comm'rs, etc., v. Mar- kle, 46 Ind. 96.....	247	Campbell v. The State, 18 Ind. 375.....	240
Board of Comm'rs, etc., v. Saun- ders, 17 Ind. 437.....	428	Callahan v. Warne, 40 Mo. 131...378	
Board of Comm'rs, etc., v. Silvers, 22 Ind. 491.....	41	Carey v. The State, ex rel., etc., 34 Ind. 105.....	116
Board of Comm'rs, etc., v. The Lafayette, etc., R. R. Co., 50 Ind. 85.....	312, 499	Carmon v. The State, 18 Ind. 450..164	
Boffandick v. Raleigh, 11 Ind. 136.306		Carpenter v. The State, 43 Ind. 371.....	306
Bogart v. The City of New Alba- ny, 1 Ind. 38.....	484	Carr v. Eaton, 42 Ind. 385.....	64
Boone v. Barnes, 23 Miss. 136....	502	Carr v. Thomas, 34 Ind. 292.....	32
Booth v. Commonwealth, 7 Met. 285.....	374, 375	Carson v. The Steamboat Talma, 3 Ind. 194.....	471
Bosseker v. Cramer, 18 Ind. 44...178		Casad v. Holdridge, 50 Ind. 529..192, 228, 229	
Bouton v. The Am. Mut. Life Ins. Co., 25 Conn. 542.....	389	Cassady v. Reid, 4 Blackf. 198....	471
Bowen v. Donovan, 32 Ind. 379..200		Catoir v. The Am. L. Ins. & T. Co., 33 N. J. L. R. 487.....	389
Bowen v. Preston, 48 Ind. 367....	430	Cattell v. Gilbert, 23 Ind. 614....	447
Bowers v. The Town of Elwood, 45 Ind. 234	484	Catterlin v. Douglass, 17 Ind. 213.200	
Bowers v. Van Winkle, 41 Ind. 432. 65		Cawthorn v. Haynes, 24 Mo. 236. 52	
Bowie v. Stonestreet, 6 Md. 418.. 20		Chambers' Adm'r v. Smith's Adm'r, 30 Mo. 156.....	375
Boyer v. The State, 16 Ind. 451.. 68		Chandler v. Cheney, 37 Ind. 391. 66	
Boylan v. Meeker, 4 Dutch. 274.. 52		Chapin v. Bridges, 116 Mass. 105..300	
Bradfield v. McCormick, 3 Blackf. 161.....	328	Chapin v. Crusen, 31 Wis. 209....	41
Bragg v. Paulk, 42 Me. 502.....	503	Chase v. Westmore, 5 M. & S. 180. 95	
Bray v. Pearsoll, 12 Ind. 334.....	379	Chedworth v. Edwards, 8 Ves. 47.333	
Brice v. Stokes, 2 White & T. Lead. Cas. 1742.	333	Chester Glass Co. v. Dewey, 16 Mass. 94.....	93
Bronson v. Hickman, 10 Ind. 401.279		Chicago, etc., R. R. Co. v. Mor- ris, 26 Ill. 400.....	156
Browder v. M'Arthur, 7 Wheat. 58.....	369	Christian College v. Hendley, 49 Cal. 347	329
Brown v. Buzan, 24 Ind. 194.....	41	Church v. Rhodes, 6 How. Pr. 281.....	41
Brown v. Freed, 43 Ind. 253....52, 53		City of Chicago v. Major, 18 Ill. 349.....	156
Brown v. Litton, 1 P. Wms. 140..333		City of Columbus v. Dahn, 36 Ind. 330.....	421
Brown v. Summerville, 8 Md. 444..372		Clark v. Dunlap, 2 Ind. 551.....	485
Buckinghouse v. Gregg, 19 Ind. 401.....	287	Clark v. Flint, 22 Pick, 231.....	502
Buel v. The N. Y. C. R. R. Co., 31 N. Y. 314.....	155	Clark v. The Jeff., etc., R. R. Co., 44 Ind. 248.....	262
Buffington v. Gerrish, 15 Mass. 156.....	502	Clark v. Henshaw, 30 Ind. 144...196	
Burke v. The State, 52 Ind. 522..336		Clarkson v. McCarty, 5 Blackf. 574.....	217, 531
Burntrager v. McDonald, 34 Ind. 277.....	32	Clary v. Hoagland, 6 Cal. 685....	372
Busenbarke v. Ramey, 53 Ind. 499.273		Clawson v. Clawson's Adm'r, 25 Ind. 229.....	67, 68
Bush v. Steinman, 1 B. & P. 404..339		Clem v. Martin, 34 Ind. 341.....	388
Busick v. The State, 19 Ohio, 198.560		Clem v. The State, 33 Ind. 418...247	
Butler v. Palmer, 1 Hill, 324.....	41	Cleveland, etc., R. R. Co. v. Crawford, 24 O. St. 631.....	148
Butler v. The State, ex rel., etc., 20 Ind. 169.	448	Clough v. Thomas, 53 Ind. 24....	28
Cain v. Guthrie, 8 Blackf. 409....	360	Cobble v. Tomlinson, 50 Ind. 550.572, 575	
Campbell v. Cross, 39 Ind. 155... 35		Colburn v. The State, ex rel., etc., 47 Ind. 310.....	325, 408
Campbell v. Penn. Life Ins. Co., 2 Whart. 53.....	333	Cole v. Clarke, 3 Wis. 323.....	374

TABLE OF CASES CITED.

ix

Collins v. Case, 23 Wis. 230.....329	Demger v. Sanger, 6 Wend. 438..378
Colter v. Frese, 45 Ind. 96.....216	Dennison v. The State, 13 Ind. 510.....356
Comer v. Himes, 49 Ind. 482.....220	De Santos v. Taney, 13 La. An. 151.....298, 299
Commonwealth v. Comly, 3 Pa. St. 372... ..333	Devol v. Halstead, 16 Ind. 187...379
Commonwealth v. Hackett, 2 Allen, 136.....317	Deweese v. Reagan, 40 Ind. 513..398
Commonwealth v. M'Pike, 3 Cush. 181.....317	Dewey v. Gray, 2 Cal. 374.....372
Commonwealth v. Peckham, 2 Gray, 514.....163	Dickerson v. Tillinghast, 4 Paige, 215.....503
Commonwealth v. Titus, 116 Mass. 42.....346	Dillon v. The State, 9 Ind. 408...317
Comstock v. Hadlyme, 8 Conn. 254. 52	Diplock v. Blackburn, 3 Camp. 43.333
Congregational Society, etc., v. Perry, 6 N. H. 164.....329	Divine v. The State, 4 Ind. 240...163
Connolly v. Kettlewell, 1 Gill, 260.142	Doeker v. Somes, 8 Eng. Ch. 172..333
Conoway v. Weaver, 1 Ind. 263.. 32	Doe v. Harter, 2 Ind. 252.....240
Cook v. Fiske, 12 Gray, 491.....300	Doe v. Jackman, 5 Ind. 283.....251
Cooper v. Lingo, 15 Ind. 67.....545	Doepfner v. The State, ex rel., etc., 36 Ind. 111.....116
Corning v. Strong, 1 Ind. 329....205	Donaldson v. The Bank of Cape Fear, 1 Dev. Eq. 103.....503
Corning v. Troy, etc., Factory, 15 How. 451.....369	Dorsch v. Rosenthal, 39 Ind. 209.173
Cox v. Pruitt, 25 Ind. 90.....376	Downer v. Cross, 2 Wis. 371.....374
Cox v. Vanderkleed, 21 Ind. 164..342	Downey v. Hinchman, 25 Ind. 453.....329
Craig v. Bagley, 1 T. B. Mon. 148.374	Driggs v. Abbott, 27 Vt. 580..... 68
Crain v. Petrie, 6 Hill, 522.....525	Driscoll v. The Newark, etc., Co., 37 N. Y. 637.....342
Crake v. Crake, 18 Ind. 156.....287	Driskill v. The State, 7 Ind. 338..238
Crickmore v. Breckenridge, 51 Ind. 294..... 56	Dritt v. Dodds, 35 Ind. 63..... 32
Crookshank v. Kellogg, 8 Blackf. 256.....379	Drury v. Newman, 99. Mass. 256..300
Croy v. The State, 32 Ind. 384...560	Dryden v. Britton, 19 Wis. 22...378
Cruzan v. Smith, 41 Ind. 288. 186, 205	Dubuque, etc., R. R., ex parte, 1 Wal. 69.....368
Cumberland, etc., Co. v. Sherman, 20 Md. 117.....371	Dummer v. Pitcher, 5 Simons, 35 ; 2 Myl. & K. 262. 68
Cummings v. Sharpe, 21 Ind. 331. 67, 68	Dunham v. Baxter, 4 Mass. 79...378
Curry v. Bratney, 29 Ind. 195....303	Dunn v. Hall, 1 Ind. 344.....531
Curry v. Miller, 42 Ind. 320.....428	Du Pont v. Davis, 35 Wis. 631...374
Cutler v. Hulbut, 29 Wis. 152....377	Durham v. Bischof, 47 Ind. 211...272
Dailey v. The State, ex rel., etc., 28 Ind. 285.....553	Durham v. Musselman, 2 Blackf. 96.....526
Daniels v. Pond, 21 Pick. 367....137	Durland v. Pitcairn, 51 Ind. 426.225
Danneburg v. The State, 20 Ind. 181.....545	Eakright v. The Logansport, etc., R. R. Co., 13 Ind. 404..... 92
Darmouth College v. Woodward, 4 Wheat. 518..... 41	Earl of Lonsdale v. Church, 3 Bro. C. C. 41.....333
Davis v. Calloway, 30 Ind 112....329	East India Co. v. Henchman, 1 Ves. Jr. 287.....333
Davis v. Campbell, 12 Ind. 192. 447, 448	Eastwood v. Kenyon, 11 A. & E. 438.....215
Davis v. Hardy, 6 B. & C. 225...377	Edwards v. Haverstick, 47 Ind. 138.....384
Davis v. Jenkins, 14 Ind. 572....303	Elizabeth City Academy v. Lindsey, 6 Ire. 476..... 93
Davis v. McAlpine, 10 Ind. 137...440	Elson v. O'Dowd, 40 Ind. 300...351, 353
Davis v. Perry, 41 Ind. 305..... 60	Emory v. Owings, 3 Md. 178.....372
Davis v. Russell, 5 Bing. 354.....378	Engard v. Frazier, 7 Ind. 154.... 32
Deardorff v. Foresman, 24 Ind. 481.....178, 323	English v. Smock, 34 Ind. 115. 247, 248
De Ford v. Urbain, 48 Ind. 219. 360, 574	

TABLE OF CASES CITED.

Epler v. Niman, 5 Ind. 459.....	20	Green v. Beeson, 31 Ind. 7.....	201
Erskine v. Hohnback, 14 Wal.		Greenland v. Chaplin, 5 Exch.	
613..	108	243.....	155
Estate of Pacheco, 29 Cal. 224....	372	Greenup v. Crooks, 50 Ind. 410...	571
Evans v. Browne, 30 Ind. 514....	255	Greer v. The State, 53 Ind. 420...	596
Evansville, etc., R. R. Co. v.		Greeg v. Strange, 3 Ind. 366.....	448
Baum, 26 Ind. 70.....	339	Griffin v. Smith, 45 Ind. 366.....	227
Eyler v. Hoover, 8 Md. 1.	372	Groesch v. The State, 42 Ind. 547.	126
Ezra v. Manlove, 7 Blackf. 389...	109	Groff v. Groff, 14 S. & R. 181.....	375
Fankboner v. Fankboner, 20 Ind.		Guard v. Risk, 11 Ind. 156.....	531
62.....	328, 485	Gullett v. Housh, 7 Blackf. 52....	219
Fairbanks v. Kerr, 70 Pa. St. 86..	526	Gunter v. Laffan, 7 Cal. 588.....	372
Feaster v. Woodfill, 23 Ind. 493..	545	Haffin v. Mason, 15 Wal. 671.....	108
Fenelon's Petition, 7 Pa. St. 173..	41	Halstead v. Brown, 17 Ind. 202...	535
Fetters v. Muncie National Bank,		Halstead v. The President, etc.,	
34 Ind. 251.....	440	4 J. J. Mar. 554.....	502
Findley v. Cooley, 1 Blackf. 262...	351	Hamilton v. Burch, 28 Ind. 233...	447
First Relig. Soc., etc., v. Stone,		Hamilton v. Elkins, 46 Ind. 213...	306
7 Johns. 112.....	329	Hamilton v. The State, ex rel.,	
Fish v. Dodge, 4 Denio, 311.....	23	etc., 3 Ind. 452.....	63
Fisher v. Hamilton, 49 Ind. 341...	342	Hammond's Lessee v. Inloes, 4	
Fisher v. Wilson, 18 Ind. 133.....	360	Md. 138.....	372
Flanders v. O'Brien, 46 Ind. 284.	273,	Hamrick v. Danville, etc., Co.,	
	501	41 Ind. 170.....	376
Flenner v. Flenner, 29 Ind. 564..	67	Hanna v. Pegg, 1 Blackf. 180.....	303
Foltz v. Peters, 16 Ind. 244.....	196	Hanse v. Cowing, 1 Lansing, 288.	23
Fort v. Collins, 21 Wend. 109....	377	Hanson v. Gardiner, 7 Ves. 305..	135
Foss v. Hildreth, 10 Allen, 76....	54	Harden v. Wolf, 2 Ind. 31.....	481
Foster v. Foster, 2 Bro. C. C. 617.	333	Hargus v. Goodman, 12 Ind. 629.	35
Fourth Ec. Soc., etc., v. Mather,		Harris v. Dailey, 16 Ind. 183.....	203
15 Conn, 587.....	68	Harris v. Osenback, 13 Ind. 445...	485
Fouty v. Fouty, 34 Ind. 433.....	352	Harris v. The Muskingum, etc.,	
Franklin College v. Hurlburt, 28		Co., 4 Blackf. 267.....	528
Ind. 344.....	93	Harshman v. Armstrong, 43 Ind.	
Franklin Life Ins. Co. v. Hazzard,		126.....	470
41 Ind. 116....	381, 382	Hart v. Marshall, 4 Minn. 294....	132
Frazee v. McChord, 1 Ind. 224...	328	Hart v. The Trustees, etc., 15	
Free v. The State, 13 Ind. 324...	492	Ind. 226.....	20
French v. Howard, 14 Ind. 455...	35	Haun v. Wilson, 28 Ind. 296.....	159
Fritz v. The State, 40 Ind. 18....	438	Hawley v. Smith, 45 Ind. 183....	376
Gaters v. Madeley, 6 M. & W..	422. 68	Hay v. The Cohoes Co., 2 Comst.	
Gaylord v. Dodge, 31 Ind. 41.....	366	159.....	341
Gelston v. Codwise, 1 Johns. Ch.		Headrick v. Wisheart, 41 Ind.	
195.....	375	87	196
George v. Harris, 4 N. H. 533...	329	Heaston v. Squires, 9 Ind. 27....	591
Gibson v. Soper, 6 Gray, 279...53,	54	Heaston v. The Cincinnati, etc.,	
Gillaspie v. Kelley, 41 Ind. 158...	186	R. R. Co., 16 Ind. 275.....	92
Ginn v. Collins, 43 Ind. 271.....	488	Heinrick v. Korn, 4 Daly, 74.....	300
Goodman v. Walker, 30 Ala. 482...	375	Helm v. The Nat'l Bank, 43 Ind.	
Goodrich v. Thompson, 4 Day,		167.....	459
215	375	Helvey v. The B'd of Comm'rs,	
Goodtitle v. Cummings, 8 Blackf.		etc., 6 Blackf. 317.....	498
179.....	448	Helwig v. Jordan, 1 Wilson Super.	
Gordon v. Culbertson, 51 Ind. 334,	464	Ct. 447.....	22
Governor, The, v. Shebly, 2 Blackf.		Hewett v. Swift, 3 Allen, 420....	339
26..	379	Hicks v. Hicks, 3 Atk. 274.....	333
Grand Trunk Ry. Co. v. Nichol,		Higgins v. Moore, 34 N. Y. 417...	300
18 Mich. 170.....	378	Higgins v. The Jeff., etc., R. R.	
Gratz v. Lancaster Bank, 17 S. &		Co., 52 Ind. 110.....	309
R. 278.....	375	Hill v. Jamieson, 16 Ind. 125.....	393

TABLE OF CASES CITED.

xi

Himely v. Rose, 5 Cranch, 313... 369	Jacobs v. Latour, 5 Bing. 130..... 95
Hinkle v. Margerum, 50 Ind. 240...571	Jagers v. Jagers, 49 Ind. 428.....574
Hobson v. Doe, 4 Blackf. 487.....376	Jansen v. Acker, 23 Wend. 480...377
Hodgeden v. Hubbard, 18 Vt. 504.502	Jeffersonville, etc., R. R. Co. v.
Hoffman Steam, etc., Co. v. Cum-	Goldsmith, 47 Ind. 43.....310
berland, etc., Co., 16 Md. 456..371	Jeffersonville, etc., R. R. Co. v.
Holland v. Hatch, 11 Ind. 497...186	Underhill, 40 Ind. 229.....489
Holland v. Pugh, 16 Ind. 21.....203	Jenkins v. Flinn, 37 Ind. 349....67, 141
Holloway v. Porter, 46 Ind. 62...286	Jenkins v. Lemonds, 29 Ind. 294..116
Hollowbush v. McConnel, 12 Ill.	Jesse v. Cater, 28 Ala. 475. 375
203.....375	Jewett Salisbury, 16 Ind. 370.....329
Hopkins v. Commonwealth, 3	Jewett v. Talbott, 11 Ind. 298...510,
Met. 460.....374	511
Horner v. Doe, 1 Ind. 130.....469	Joest v. Williams, 42 Ind. 565....360
Hosea v. The State, 47 Ind. 180..452	Johnson v. Chambers, 12 Ind. 102.287
Hoss v. The State, 18 Ind. 349 ..356	Johnson v. Cookerly, 33 Ind. 151.360
Howe v. Dibble, 45 Ind. 120.....173	Johnson v. Houghton, 19 Ind.
Howe v. Newmarch, 12 Allen, 49.339	359.....360
Howes v. Halliday, 18 Ind. 339..569	Johnson v. Runyon, 21 Ind. 115.. 68
Howorth v. Scarce, 29 Ind. 278...328	Johnson v. Seymour, 19 Ind. 24..328
Huff v. Cole, 45 Ind. 300....286, 479	Johnson v. The C. F., etc., Co.,
Hull v. Kilpatrick, 4 Ind. 637....279	11 Ind. 280..... 4
Hunt v. Standart, 15 Ind. 33.....286	Johnson v. The U. S., 5 Mason,
Huston v. Neil, 41 Ind. 504..... 7	425.....593
Hutchins v. Gilman, 9 N. H. 359.. 68	Johnson v. Wabash College, 2 Ind.
Hutson v. Merrifield, 51 Ind. 24..382,	555.....329
387	Jones v. Chandler, 40 Ind. 588... 66
Hyatt v. Hyatt, 33 Ind. 309.....545	Jones v. Clark, 9 Ind. 341.....574
Hynds v. Hays, 25 Ind. 31.....378,	Jones v. Gregg, 17 Ind. 84.....549
379, 387	Jones v. The State, 14 Ind. 120...492
I., B. & W. R. W. Co. v. Carr,	Jones v. Yetman, 6 Ind. 46.....484
35 Ind. 510.....156	Julian v. Beal, 34 Ind. 371.....368
I. & C. R. R. Co. v. Clark, 21	Kambieskey v. The State, 26 Ind.
Ind. 150..... 35	225.....545
Ind. Cent. R. W. Co. v. Leaman,	Keating v. The State, ex rel., etc.,
18 Ind. 173.. 549	44 Ind. 449553
Indianapolis Furnace, etc., Co. v.	Kelley v. The State, 53 Ind. 311..526
Herkimer, 46 Ind. 142..... 93	Kelsey v. Henry, 48 Ind. 37.....217
Indianapolis, etc., R. R. Co. v.	Kent v. Cantrall, 44 Ind. 452.....328
Ballard, 22 Ind. 448.....217	Kidwell v. The State, ex rel., etc.,
Indianapolis, etc., R. R. Co. v.	45 Ind. 27.....407
Wharton, 13 Ind. 509.....489	Kimberly v. Henderson, 29 Md.
Indianapolis, etc., Union v. The	512.....298
Cleveland, etc., R. W. Co., 45	King v. The Enterprise Ins. Co.,
Ind. 281.....205	45 Ind. 43.....388
Inhabitants, etc., v. Bell, 9 Met.	King v. The Indian Orchard Ca-
499.....333	nal Co., 11 Cush. 231..... 95
Inhabitants, etc., v. Hazzard, 12	Kingsbury v. Buckner, 5 Chicago
Cush. 112.....333	L. News, 435.....375
Instone v. The Frankfort Bridge	Kiphart v. The State, 42 Ind. 273..571
Co., 2 Bibb, 576..... 93	Kirby v. Cannon, 9 Ind. 371.....569
Ireland v. Montgomery, 34 Ind.	Kirk v. Hiatt, 2 Ind. 322205
174.....470	Knapp v. Wallace, 41 N. Y. 477.300
Ireland v. Webber, 27 Ind. 256... 68	Knarr v. Conaway, 42 Ind. 260...121
Ireley v. Lovejoy, 8 Blackf. 462..531	Knight v. McDonald, 37 Ind. 463.214
Ives v. Sterling, 6 Met. 310.....329	Knight v. The Flat Rock, etc.,
Jackson v. Finch, 27 Ind. 316....398	Co., 45 Ind. 134.....206, 210
Jackson v. Gumaer, 2 Cow. 552... 53	Knour v. Dick, 14 Ind. 20..... 217
Jackson v. Kniffen, 2 Johns. 31... 62	Koelges v. The Guard. Life Ins.
Jackson v. Reeves, 53 Ind. 231...343	Co., 2 Lansing, 480.....389

Kratemayer v. Brink, 17 Ind. 509.123	Massey v. Davies, 2 Ves. Jr. 317..333
Lafayette, etc., R. R. Co. v. Adams, 26 Ind. 76.....310	Matter of N. Y. C. R. R. Co., 49 N. Y. 414.....582
Lagro, etc., Pl. R'd Co. v. Eriston, 10 Ind. 342.....569	Maulden v. Armistead, 30 Ala. 480.....375
Lane v. Albright, 49 Ind. 275....300	Maxwell v. Day, 45 Ind. 509.....286
Langsdale v. Girton, 51 Ind. 99...575	Mayor, etc., of Albany v. Cunniff, 2 Comst. 174.....23
Lathrop v. Knapp, 27 Wis. 214..329, 330	McAuley v. Billinger, 20 Johns. 89.....329
Law v. Long, 41 Ind. 586.....53	McAllister v. The State, 17 Ala. 434.....317
Lawrenceburgh, etc., Co. v. Montgomery, 7 Ind. 474.....379	McCabe v. The Board, etc., 46 Ind. 380.....275
Lawson v. Sherra, 21 Ind. 363....328	McClure v. McClure, 19 Ind. 185.303
Lay's Ex'rs v. Brown, 13 B. Mon. 295.....69	McClure v. The State, 29 Ind. 359.....240
Lee v. Carter, 52 Ind. 342392	McCrary v. Foster, 1 Iowa (Clarke) 271.....69
Lee v. Lee, 2 Vern. 548.....333	McCulloch v. The State, 48 Ind. 109.....278
Lee v. Monroe, 7 Cranch, 366....593	McCullough v. Cook, 34 Ind. 290.328
Leese v. Clark, 20 Cal. 387.....372	McCullough v. The State, ex rel., etc., 14 Ind. 391.....553
Leland v. Creyon, 1 McCord, 100..142	McDonald v. Yeager, 42 Ind. 388.242
Leviston v. The Junction R. R. Co., 7 Ind. 597.....329	McElfresh v. Guard, 32 Ind. 408..160
Lewis v. Jones, 17 Pa. St. 262....137	McEwen v. Hussey, 23 Ind. 395..107
Lewis v. Lewis, 30 Ind. 257.....304	McGavock v. Woodlief, 20 How. 221.....296
Lewis v. Lyman, 22 Pick. 437....136	McGuire v. Callahan, 19 Ind. 128.360
Lighte v. The Everett Fire Ins. Co., 5 Bosw. 716.....529	McIntire v. Young, 6 Blackf. 496.531
Lincoln v. The State, ex rel., etc., 36 Ind. 161.....41	McLaughlin v. The State, 45 Ind. 338.....233
Lodge v. Hamilton, 2 S. & R. 491. 68	McLeod v. Bertschy, 34 Wis. 244.374
Logansport, etc., Co. v. Davidson, 51 Ind. 472.....83	McMannus v. Smith, 53 Ind. 211.211
Long v. The State, 46 Ind. 582. 356, 556	McMaster's Petition, 7 Pa. St. 173. 41
Loomis v. Simpson, 13 Iowa, 532.206	McNiel v. Farneman, 37 Ind. 203.570
Love v. Oldham, 22 Ind. 51.....360	McPike v. Pen, 51 Mo. 63.....201
Lucas v. Board of Comm'rs, etc., 44 Ind. 524.....41	McTaggart v. Thompson, 14 Pa. St. 149.....52
Lucas v. San Francisco, 28 Cal. 591.....372	Meeker v. The Board, etc., 53 Ind. 31.....173
Lucas v. Smith, 42 Ind. 103.....235	Melchoir v. McCarty, 31 Wis. 252.....207
Lytle v. Lytle, 31 Ind. 281... 59	Meni v. Rathbone, 21 Ind. 454...231
Mackay v. N. Y. C. R. R. Co., 35 N. Y. 75145	Menifee v. Clark, 35 Ind. 304....479
Madison, etc., R. R. Co. v. The Trustees, etc., 8 Ind. 528.....569	Mercer v. Patterson, 41 Ind. 440. 227, 328
Mahoney v. Bland, 14 Ind. 176... 68	Michael v. Thomas, 27 Ind. 501..328
Manhattan Co. v. Evertson, 6 Paige, 644.....503	Michoud v. Girod, 4 How. 503...333
Marble v. The City of Worcester, 4 Gray, 395524	Middlebrook v. Corwin, 15 Wend. 169.....136
Marion Township Gravel Road Co. v. Sleeth, 53 Ind. 35.....70	Middleton v. Findla, 25 Cal. 76..300
Mark v. The State, ex rel., etc., 15 Ind. 98.....453	Miller v. Burger, 2 Ind. 337.....545
Marston v. Roe, 8 A. & E. 14.... 52	Miller v. Edmonston, 8 Blackf. 291.....205
Martin v. Beasley, 49 Ind. 280...196	Milwaukie, etc., R. R. Co. v. Soutter, 2 Wal. 510.....368
Martin v. Hunter's Lessee, 1 Wheat. 304.....368, 369	Miles v. Caldwell, 2 Wal. 35.....35
Martin v. Reed, 30 Ind. 218.....110	Mitchel v. Davis, 23 Cal. 381.372, 373

TABLE OF CASES CITED.

xiii

Moffitt v. Wilson, 44 Ind. 476.....484	Oldfield v. N. Y. & H. R. R. Co.,
Mollihan v. The State, 30 Ind.	3 E. D. Smith, 103.....156
266.....207	O'Neil v. Chandler, 42 Ind. 471....352
Mong v. Bell, 7 Gill, 246.....372	O'Neil v. Dougherty, 46 Cal. 575.442
Mooney v. Elder, 56 N. Y. 238...300	Onslow v. —, 16 Ves. 173.....134
Moore v. Fitchburg R. R. Co., 4	Orr v. Worden, 10 Ind. 553.....32
Gray, 465.....339	Owen v. Cooper, 46 Ind. 524.....60
Moore v. Kent, 37 Iowa, 20.....430	Owens v. Lewis, 46 Ind. 488.....135
More v. Massini, 32 Cal. 590.....134	Oxley v. Lane, 35 N. Y. 340.....251
Moritz v. Brough, 16 S. & R. 403.. 52	Pace v. Grove, 26 Ind. 26.....328
Morse v. Androscoggin R. R. Co.,	Packer v. Burt, 51 Ind. 588..263, 266
39 Me. 285.....95	Page v. Thompson, 33 Ind. 137...574
Morse v. Godfrey, 3 Story, 364...503	Parker v. Pomeroy, 2 Wis. 112...374
Moss v. Rowland, 3 Bush, 505...374	Parks v. Evansville, etc., R. R.
Mossman v. Forrest, 27 Ind. 233..247	Co., 23 Ind. 567.....360
Mullen v. Jennings, 1 Stock. 192..132	Parsons v. The State, 21 Ala. 300..317
Murphy v. The State, 31 Ind. 511.	Patchin v. Swift, 21 Vt. 292.....329
355, 356	Patten v. Stewart, 24 Ind. 332..360,
Musselman v. Cravens, 47 Ind. 1.. 53	573
Muzzy v. Shattuck, 1 Den. 233...333	Patterson v. Dallas, 46 Ind. 48... 65
Myrick v. The Board, etc., 33 Ind.	Pattison v. Vaughan, 40 Ind. 253.385
383.....130	Peacock v. Bell, 1 Saund. 73.....247
National Exchange Bank v. Hart-	Peck v. Martin, 17 Ind. 115.....283
ford, etc., R. R. Co., 8 R. I.	Peebles v. Rand, 43 N. H. 340...379
375.....192	Peirce v. Ruley, 5 Ind. 69.....329
Nave v. Nave, 12 Ind. 1.....570	Pennsylvania R. R. Co. v. McClos-
Nebeker v. Cutsinger, 48 Ind.	key's Adm'r, 23 Pa. St. 526.....156
436.....278	Pepper v. The State, ex rel., etc.,
Negley v. Wilson, 14 Ind. 215...545	22 Ind. 399.....77
Nelson v. Blakey, 47 Ind. 38.....93	People, The, v. Cogdell, 1 Hill, 94.347
Newby v. Hinshaw, 22 Ind. 334.398	People, The, v. McGaven, 17
Newell v. Downs, 8 Blackf. 523...217	Wend. 460.....347
Newton v. Bennett, 1 Bro. C. C.	Perine v. Dunn, 4 Johns. Ch. 140.375
359.....333	Perkins v. Bayntun, 1 Bro. C. C.
Nichol v. McCalister, 52 Ind. 586.352	375.....333
Nichols v. Bridgeport, 27 Conn.	Perkins v. Clements, 1 Pat. & H.
459.....375	(Va.) 141.....68
Nichols v. Goldsmith, 1 Wend.	Phelan v. San Francisco, 20 Cal.
160.....378	39.....372
Nicholson v. Caress, 45 Ind. 479. 66	Philadelphia, etc., R. R. Co. v.
Niles v. Stillwagon, 22 Ind. 143..353	Derby, 14 How. 468,.....339
Nixon v. Brown, 4 Blackf. 157...379	Philips v. Doe, 3 Ind. 132.....231
Nixon v. The People, 2 Scam. 267.317	Philpot v. Webb, 20 Ind. 509....398
Noble's Ex'x v. Noble, 19 Ind.	Pierce v. Baird, 48 Ind. 378.....303
431.....67	Pierce v. Goldsberry, 35 Ind. 317.101
Noel v. Ewing, 9 Ind. 31.....430	Pierce v. Kneeland, 9 Wis. 23....374
Noonan v. Lee, 2 Blackf. 499.....591	Poor v. Woodburn, 25 Vt. 234...502
Noonan v. Orton, 27 Wis. 300...374	Port v. Williams, 6 Ind. 219.....262
Norris v. Beyea, 3 Kern. 273.....251	Porter v. Millard, 18 Ind. 502....379
North Canal Street R'd, 10 Watts,	Post v. Pedrick, 52 Ind. 490.....488
351.....41	Powell v. Jeffries, 4 Scam. 387...503
Northwestern Conference, etc., v.	Prather v. The Jeff., etc., R. R.
Myers, 36 Ind. 315.....93, 329	Co., 52 Ind. 16.....582
Nunemacher v. Ingle, 20 Ind.	President, etc., v. Dusouchett, 2
135.....353	Ind. 586.....402
O'Conner v. O'Conner, 27 Ind.	President, etc., v. The State, 1
69.....159	Blackf. 267.....41
Ogle v. Stoops, 11 Ind. 380.....398	Preston v. Leighton, 6 Md. 88...372
Ohio, etc., R. R. Co. v. Davis,	Preston v. Sandford's Adm'r, 21
23 Ind. 553.....58	Ind. 156.....469

- Prevost v. Gratz, Pet. C. C. 364-333
 Pribble v. Kent, 10 Ind. 325.....574
 Provident Life Ins. etc., Co. v.
 Baum, 29 Ind. 236.....382
 Provis v. Reed, 5 Bing. 435.... 52
 Pruitt v. Miller, 3 Ind. 16.....205
 Pugh v. Irish, 43 Ind. 415.....201
 Pulteney v. Shelton, 5 Ves. 147...134
 Pursley v. Morrison, 7 Ind. 356...186
 Queen, The, v. Mutters, 34 L. J.
 Mag. Cas. 22.....342
 Queen, The, v. West, 2 Car. &
 K. 784.....317
 Quigley v. City of Aurora, 50 Ind.
 28.....484
 Rafert v. Scroggins, 40 Ind. 195..388
 Railroad Co. v. Barron, 5 Wal.
 90157
 Ramsden v. Boston, etc., R. R.
 Co., 104 Mass. 117.....339
 Ransom v. Priam Lodge, etc., 51
 Ind. 60.....93
 Ratcliffe v. Graves, 1 Vern. 196..333
 Rathbone v. Tioga Nav. Co., 2
 Watts & S. 7493
 Rathel v. Brady, 44 Ind. 412.....205
 Read v. Raum, 10 B. & C. 438...297
 Reams v. The State, 23 Ind. 111..248
 Redwine v. The State, 15 Ind.
 293.....545
 Reed v. Jones, 15 Wis 40.....374
 Reed v. Proprietors, etc., 8 How.
 274.....591
 Reed v. Sering, 7 Blackf. 135.....484
 Reeves v. Plough, 46 Ind. 350... 71
 Regina v. Holland, 2 Moody &
 Rob. 351.....317
 Regina v. Minnock, 1 Crawf. &
 Dix C. C. 537.....317
 Reitz v. Martin, 12 Ind. 306..186, 205
 Rew's Case, J. Kel. 26.....316
 Rex v. Pedley, 1 A. & E., 822.... 23
 Rhoades v. Delaney, 50 Ind. 468.470
 Rice v. Mayo, 107 Mass. 550.....300
 Rice v. The State, 16 Ind. 298...559
 Rich v. Basterfield, 4 C. B. 783... 23
 Richards v. Jackson, 331 Md. 250.297,
 299
 Richardson v. Daggett, 4 Vt. 336. 68
 Richardson v. Howk, 45 Ind. 451, 60,
 469
 Richardson v. N.Y. C. R. R. Co.,
 45 N. Y. 846.....145
 Ridenour v. Wherritt, 30 Ind. 485.499
 Ring v. Ewing, 47 Ind. 246.....200
 Ritchey v. The State, 7 Blackf.
 168.....31
 Roberts v. Cooper, 20 How. 467.369,
 370
 Roberts v. Masters, 40 Ind. 461..289
 Robinson, ex parte, 2 Bissell, 309.459
 Robinson v. Lord Byron, 1 Bro.
 C. C. 588134
 Robinson v. The Board of Com-
 missioners, etc., 37 Ind. 333....471
 Rock v. Stinger, 36 Ind. 346.....334
 Romaine v. The State, 7 Ind. 63..560
 Rose v. The Thames Bank, 15
 Ind. 292261
 Ross v. City of Madison, 1 Ind.
 281.....275
 Ross v. The Lafayette, etc., R. R.
 Co., 6 Ind. 29792
 Roswell v. Prior, 12 Mod. 635; 1
 Lord Raym. 713; 2 Salk. 460... 23
 Roush v. Morrison, 47 Ind. 414.. 41
 Rowe v. Beckett, 30 Ind. 154.... 52
 Rudd v. Davis, 3 Hill, 387... ..377
 Ruloff v. The People, 18 N. Y.
 179.....278
 Rush v. Megee, 36 Ind. 69..... 52
 Ryan v. Martin, 18 Wis. 672.....374
 Ryan v. The N. Y. C. R. R., 35
 N. Y. 210.....526
 Ryan v. The World Mut. Life
 Ins. Co., 41 Conn. 168.....389
 Sample v. Rowe, 24 Ind. 208.....501
 Sanders v. Johnson, 6 Blackf. 50..531
 Sargent v. Adams, 3 Gray, 72.....591
 Saville v. Lord Farnham, 2 Mann.
 & Ryl. 216.....378
 Sawyer v. Twiss, 6 Fost. (N. H.)
 345137
 Schnewind v. Hackett, 54 Ind....482
 Scobey v. Ross, 13 Ind. 117...319,
 320
 Scott v. Hull, 14 Ind. 136....471, 473
 Scott v. Simes, 10 Bosw. 314..... 68
 Scott v. The Board, etc., 51 Ind.
 502130
 Scoten v. The State, ex rel., etc.,
 51 Ind. 52..... 77
 Scranton v. Stewart, 52 Ind. 68... 53
 Searing v. Searing, 9 Paige, 283.. 68
 Seymour v. The State, 15 Ind. 288.545
 Schafer v. The State, 26 Ind. 191.163
 Shailer v. Bumstead, 99 Mass. 112. 52
 Shaw v. Barnheart, 17 Ind. 183...360
 Sheets v. Selden's Lessee, 2 Wal.
 177.....582, 587
 Shelmire v. Thompson, 2 Blackf.
 270219
 Shepherd v. Fisher, 17 Ind. 229..360
 Sherry v. Picken, 10 Ind. 375.574
 Shields v. Stillman, 48 Mo. 82.... 68
 Shimer v. Bronnenburg, 18 Ind.
 363.....283
 Shinloub v. Ammerman, 7 Ind.
 347328
 Shirley v. Hagar, 3 Blackf. 225...471

TABLE OF CASES CITED.

xv

Shirts v. Irons, 37 Ind. 98.....159	State v. Springfield T'p, 6 Ind. 83.41, 499
Shoemaker v. Board of Comm'rs, etc., 36 Ind. 175..... 63	State v. Town of Bergen, 5 Vroom, 438..... 41
Shover v. Jones, 32 Ind. 141.....570	State v. Weston, 9 Conn. 526.....347
Sebbald (ex parte) v. The U. S., 12 Pet. 488.....369	State, ex rel., etc., v. Fleming, 46 Ind. 206.....118
Simpkins v. Wilson, 11 Ind. 541..219	State, ex rel., etc., v. Givan, 45 Ind. 267.....118
Simpson v. Hart, 1 Johns. Ch. 91.375	State, ex rel., etc., v. Shackelford, 15 Ind. 376.....109
Singleton v. Pacific R. R. 41 Mo. 465.....378	State, ex rel., etc., v. The Board, etc., 49 Ind. 457.....247
Siter v. M'Clanachan, 2 Grat. 280. 68	Stedman v. Boone, 49 Ind. 469..573, 574
Siter v. Sheets, 7 Ind. 132.....207	Stehman v. Crull, 26 Ind. 436..... 52
Sizer v. Many, 16 How. 98...369, 370	Steinmetz v. Wingate, 42 Ind. 574.379
Skeen v. Muir, 34 Ind. 310.....262	Stephens v. Brooks, 2 Bush, 137..378
Skillen v. Jones, 44 Ind. 136.....572	Stephenson v. The State, 28 Ind. 272.....253
Skillern's Ex'rs v. May's Ex'rs, 6 Cranch, 267368	Stewart v. Ludwick, 29 Ind. 230.360
Skinner v. Deming, 2 Ind. 558...219	Stewart v. The State, 24 Ind. 142.571
Sloan v. The State, 8 Blackf. 361. 41	Stewart v. The Trustees, etc., 2 Den. 403.....329
Small v. Roberts, 51 Ind. 281.....398	Stevens v. Nevitt, 15 Ind, 224....570
Smead v. The Indianapolis, etc., Co., 11 Ind. 104 41	Stillman v. Mitchell, 2 Rob. (N. Y.) 523.....300
Smith v. Denman, 48 Ind. 65.....306	Story, ex parte, 12 Pet. 339.....368
Smith v. Doggett, 14 Ind. 442....126	Stout v. The I. & St. L. R. R. Co., 41 Ind. 149.....145, 158
Smith v. Gibson, 6 Blackf. 369...205	Struble v. Nodwift, 11 Ind. 64...109
Smith v. Hann. & St. J. R. R. Co., 37 Mo. 287.....378	Suber's Road, 28 Pa. St. 199..... 41
Smith v. Knox, 3 Esp. 42.....440	Sturgis v. Fay, 16 Ind. 429.....470
Smith v. Smith. 15 Ind. 315..... 32	Supervisors, etc., v. Dorr, 25 Wend. 440.....333
Smith v. Smith, 23 Ind. 202.....398	Swift v. Pierce, 13 Allen, 136.....142
Smith v. Sublett, 28 Tex. 163.....206	Taber v. Hutson, 5 Ind. 322.....342
Smith v. Talbott, 11 Ind. 144..... 63	Taggart v. Boldin, 10 Md. 104.... 68
Smith v. The Muncie Nat'l Bank, 29 Ind. 158.....287	Taggart v. The State, ex rel., etc., 49 Ind. 42 to 50..... 77
Smithwick v. Ellison, 2 Ire. 236..137	Tar River Navig. Co. v. Neal, 3 Hawks, 520..... 93
Snelson v. The State, ex rel., etc., 16 Ind. 29.....428	Taylor v. Conner 7 Ind. 115.....247
Snyder v. The State, ex rel., etc., 21 Ind. 77..... 77	Taylor v. Elliott, 52 Ind. 588.....441
Soule v. Ritter, 20 Cal. 522.....372	Taylor v. Sample, 51 Ind. 423.....430
Spahr v. Nicklaus, 51 Ind. 221...217	Taylor v. Short, 40 Ind. 506.....284
Spitler v. James, 32 Ind. 202.....186	Temple v. Irvin, 34 Ind. 412.....470
Splahn v. Gillespie, 48 Ind. 397.446, 448	Temple v. Williams, 4 Ire. Eq. 39. 68
Springer v. Drosch, 32 Ind. 486..352	Terre Haute, etc., R. R. Co. v. Graham, 46 Ind. 239.....310
Spurgeon v. Scheible, 43 Ind. 216.251	Terre Haute, etc., R. R. Co. v. Norman, 22 Ind. 63.....143
Stafford v. Davidson, 47 Ind. 319.328	The Santa Maria, 10 Wheat. 431..369
Staple v. Spring, 10 Mass. 74..... 23	Thompson v. Page, 1 Met. 565....329
State Bank v. Hayes, 3 Ind. 400..379	Thompson v. Shaefer, 9 Ind. 500.569
State Board, etc., v. The Citizens, etc., Co., 47 Ind. 407.....499	Thurston v. Cornell, 38 N. Y. 281.421
State v. Baker, 1 Jones (N. C.) 267.317	Tisdale v. Inhabitants, etc., 8 Met. 388.....524
State v. Calligan, 17 N. H. 253...356	Toledo, etc., R. R. Co. v. City of Lafayette, 22 Ind. 262.....201
State v. Cooper, 5 Blackf. 258..... 41	
State v. Elder, 35 Ind. 368.....240	
State v. Graeter, 6 Blackf. 105...336	
State v. Harper, 38 Ind. 13.....571	
State v. Kesler, 8 Blackf. 575.....357	
State v. Oskins, 28 Ind. 364.....362	
State v. Scott, 12 La. An. 274317	

Toledo, etc., R. W. Co. v. Rogers, 48 Ind. 427.....	107	Vanschoiack v. Farrow, 25 Ind. 310.....	210
Tomlinson v. Jessup, 15 Wal. 454. 41		Vawter v. Franklin College, 53 Ind. 88.....	93, 275
Town of Cicero v. Clifford, 53 Ind. 191.....	229	Voris v. The State, ex rel., etc., 47 Ind. 345.....	408
Town of Ligonier v. Ackerman, 46 Ind. 552.....	496	Wade v. Fite, 5 Blackf. 212.....	405
Train v. Gridley, 36 Ind. 241.....	469	Waggoner v. Jermaine, 3 Den. 306. 23	
Tremain v. The Cohoes Co., 2 Comst. 163.....	342	Wait v. Maxwell, 5 Pick. 217.....	53
Treves v. Townshend, 1 Bro. C. C. 384.....	333	Walker v. Houlton, 5 Blackf. 348..	35
Tribble v. Frame, 3 T. B. Mon. 51. 374		Wall v. Home Ins. Co., 8 Bosw. 597. 389	
Trinity County v. McCammon, 25 Cal. 117.....	372	Walpole's Adm'r v. Bishop, 31 Ind. 156.....	110
Tripp v. Elliott, 5 Blackf. 168....	484	Ward v. The State, 48 Ind. 289..	312
Trueblood v. Hollingsworth, 48 Ind. 537.....	210	Washington Bridge Co. v. Stewart, 3 How. 413.....	369, 375
Truitt v. Truitt, 38 Ind. 16.....	27	Waterman v. Whitney, 1 Kern. 157. 52	
Trustees, etc., v. Cows, 6 Pick. 427. 329		Watkins v. Eames, 9 Cush. 537..	329
Trustees, etc., v. Nelson, 24 Vt. 189. 329		Watts v. The State, 33 Ind. 237..	545
Trustees, etc., v. Stetson, 5 Pick. 506.....	329	Weaver v. The State, ex rel., etc., 8 Blackf. 563.....	109
Trustees, etc., v. Stewart, 1 Comst. 581.....	329, 330	Weeks v. City of Milwaukee, 10 Wis. 242.....	41
Tucker v. Moreland, 10 Pet. 58... 53		Welch v. Bennett, 39 Ind. 136....	376
Turbeville v. The State, 42 Ind. 490.....	255	Wert v. The Crawfordsville, etc., Co., 19 Ind. 242.....	93
Tyner v. Stoops, 11 Ind. 22.....	286	Westfall v. Stark, 24 Ind. 377....	284
Ulmer v. The State, 14 Ind. 52... 492		Weston v. Lumley, 33 Ind. 486... 428	
Underwood v. Waldron, 12 Mich. 73.....	329	Whaley v. Gleason, 40 Ind. 405... 570	
Union Cent. Life Ins. Co. v. Thomas, 46 Ind. 44.....	387	White v. Conover, 5 Blackf. 462..	247
United Life, etc., Co. v. The Pres., etc., 42 Ind. 588.....	389	White v. Wilson, 6 Blackf. 448... 501	
United States v. Boyd, 15 Pet. 187. 118		Wilcox v. Hawley, 31 N. Y. 648..	375
United States v. Gear, 3 How. 120. 134		Wild Cat Branch v. Ball, 45 Ind. 213.....	323
United States v. Martin, 2 Paine, 68.....	593	Wilde v. Commonwealth, 2 Met. 408.....	374
United States v. Morgan, 11 How. 154.....	333	Willey v. Koons, 49 Ind. 272.....	62
United States v. Prescott, 3 How. 578.....	333	Williams v. Port, 9 Ind. 551.....	262
Upshaw v. Hargrove, 6 Sm. & M. 286.....	502	Wilson v. Kinsey, 49 Ind. 35.....	440
Utica, etc., Co. v. Lynch, 11 Paige, 520.....	333	Wilson v. Truelock, 19 Ind. 389..	32
Van Dorn v. Bodley, 38 Ind. 402. 255		Winterrowd v. Messick, 37 Ind. 122.....	545
Van Heusen v. Radcliff, 17 N. Y. 580.....	503	Wolf v. Schofield, 38 Ind. 175....	303
		Woodruff v. Garner, 27 Ind. 4....	34
		Wright v. Harris, 29 Ind. 438....	207
		Wright v. McGinnis, 37 Ind. 421. 130	
		Wright v. Sperry, 25 Wis. 617....	374
		Yancy v. Teter, 39 Ind. 305.....	266
		Young v. The State, 34 Ind. 46... 207	
		Zimmerman v. Marchland, 23 Ind. 474.....	421

JUDGES
OF THE
SUPREME COURT OF JUDICATURE
DURING THE TIME OF THESE REPORTS.

HON. ALEXANDER C. DOWNEY.* †

HON. JAMES L. WORDEN.†

HON. SAMUEL H. BUSKIRK.†

HON. JOHN PETTIT.†

HON. HORACE P. BIDDLE.

HON. SAMUEL E. PERKINS.§

HON. WILLIAM E. NIBLACK.§

HON. GEORGE V. HOWK.§

*Chief Justice at the May term, 1876.

†Chief Justice at the November term, 1876.

‡Term of office expired January 3d, 1877.

§Term of office commenced January 3d, 1877.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1876, IN THE SIXTIETH
YEAR OF THE STATE.

EVANS v. WHITE, ADMINISTRATOR.

PLEADING.—*Immaterial Matter.*—A complaint in which facts constituting a cause of action have been alleged cannot be made stronger by an averment that the defendant represented the facts to be as so alleged, and such an averment may be struck out as immaterial on motion.

SAME.—*Duplicity.*—Material matter which renders a pleading double should be struck out on motion.

MORTGAGE.—*Acceptance of*—A mortgage does not become a lien until the date of its acceptance by the mortgagee or his agent for him.

From the Hamilton Circuit Court.

J. W. Evans and *R. R. Stephenson*, for appellant.

D. Moss, for appellee.

DOWNEY, C. J.—Suit by the appellant against the appellee, involving a question of priority of lien between the parties upon certain real estate. The complaint was in three paragraphs. A part of the second paragraph was struck out on motion of the defendant, and the plaintiff excepted.

Evans v. White, Administrator.

The defendant answered in two paragraphs, to the second of which a demurrer was sustained.

There was a trial by the court, and, at the request of the plaintiff, a special finding and conclusions of law, which were in favor of the defendant. The plaintiff excepted to the conclusions of law. Final judgment for the defendant. The errors assigned are, that the court improperly struck out a portion of the second paragraph of the complaint, and erred in the conclusions of law.

The second paragraph of the complaint, as originally filed, alleged that the plaintiff was the owner of several tracts of land, which are particularly described in the complaint; that he derived title thereto as follows: On the 16th day of March, 1871, Daniel Stanton recovered a judgment in the Hamilton Circuit Court against John F. McClellan, then the owner of the lands; that on the 4th day of October, 1871, an execution was issued on such judgment, which was, on the same day, levied on the real estate; that it was duly advertised for sale on the 6th day of January, 1872; that said real estate was, on that day, sold by the sheriff to said Daniel Stanton for seven hundred and ninety-four dollars and twelve cents, and a certificate of purchase given to him; that on the 17th day of March, 1871, in an action in said court, in which John F. McClellan was plaintiff, and this plaintiff was defendant and cross complainant, this plaintiff sued out an attachment against the property of said McClellan; the sheriff seized said lands; and by the consideration and judgment of said court the plaintiff recovered a personal judgment, on the — day of September, 1871, against said McClellan, for two thousand nine hundred and sixteen dollars and thirty-three cents; that at the March term, 1873, the said lands so attached were ordered to be sold to satisfy said judgment; that, to make any part of such judgment of said Stanton, he purchased said lands from him for nine hundred dollars, and took an assignment of said certificate of sale from said Stanton on the 28th day of October, 1872, and afterwards, more

Evans v. White, Administrator.

than a year from the time of said sale, accepted from the sheriff a deed for said lands; and on the 5th day of April, 1871, the said John F. McClellan, in order to wrong and defraud the said Stanton and this plaintiff out of the collection of said judgments, made and executed to the defendant, Tilburn White, as guardian, etc., a mortgage on the same lands, to secure, as stated in the mortgage, four promissory notes, amounting to nine hundred and fifty dollars, and antedated the same as of the 28th day of January, 1871; THAT on said 5th day of April, the said Tilburn White, who was guardian, etc., notified this complainant that he, said guardian, had, on that day, taken and accepted said mortgage for his said wards, and that it was junior to the attachment suit aforesaid and junior to the said Stanton's judgment, and that if said attachment proceedings were sustained, his said mortgage would be subject to the prior lien of the same; that this complainant believed and relied on said statement, and was thereby induced to prosecute his said attachment to final judgment and to purchase the said lands as above averred and pay out his money thereon in the sum of one thousand DOLLARS. It is then alleged that Milton Simms, one of the wards, having arrived at full age and become the sole owner of all the notes described in said mortgage, procured a judgment to be rendered in said court, declaring that the mortgage was executed on the 28th day of January, 1871, and thus declaring that the mortgage became a lien on said land more than two months before its execution. The plaintiff therefore says that the said mortgage was fraudulent and void as against him and as against Stanton; but the same and the judgment thereon constitute an apparent lien prior to said judgment, etc.; wherefore, etc.

The part of the paragraph struck out is that commencing with the word "that" in small capitals, and ending with the word "dollars," indicated in the same way. The ground of the motion to strike out was, that the matter pointed out was irrelevant and immaterial. We cannot say that there was any error in this ruling. The substance of the paragraph is,

Evans v. White, Administrator.

that the mortgage was given a false date, so as to make it apparently a lien prior to the judgment and attachment under which the plaintiff claims title. A representation by the defendant that such was the fact does not, it seems to us, make the cause of action any stronger. If we are mistaken in this, still it was not error to strike the matter out of the pleading. If it was material, then it rendered the pleading double, and was, for that reason, properly struck out. 2 G. & H. 102, sec. 77; *Johnson v. The C. F., etc., Co.*, 11 Ind. 280.

The court found that on the 16th day of March, 1871, one Daniel Stanton recovered judgment in that court against the mortgagor, John F. McClellan, in the sum of seven hundred and ninety-four dollars and twelve cents; that he afterwards sued out execution on said judgment and had the same levied on the lands described in the mortgage; that the sheriff of that county duly and legally sold the same at sheriff's sale to said Daniel Stanton, on the 6th day of January, 1872, for the sum of seven hundred and ninety-four dollars and twelve cents, and that said Daniel Stanton, soon after said sale, sold and assigned his certificate of purchase for said lands to the plaintiff for one thousand dollars, and, after the expiration of one year from the time of the sheriff's sale, the sheriff made the plaintiff a sheriff's deed for the lands in due form of law; that on the 17th day of March, 1871, the plaintiff herein obtained a lien on said lands in the sum of two thousand nine hundred and thirty-three dollars and sixteen cents, by certain attachment proceedings then begun by him in this court against said mortgagor, which yet remains due and unpaid, and has been reduced to a judgment in this court; that said John F. McClellan became the owner of the lands in question described in the mortgage, on the 30th day of January, 1871; that the mortgage made by him to the defendant was dated January 28th, 1871, and purports to be signed by him on that day; that it was signed by him in the office of Moss & Trissal, who were the defendant's agents to procure the same and accept it; that

the notes secured by the said mortgage also purport to be dated on the 28th day of January, 1871; that said notes and mortgage were actually signed by said McClellan in February, 1871, from the 1st to the 5th day of the month, and that during said month of February, 1871, the said Moss & Trissal exhibited said mortgage to the defendant, who is the mortgagee, and he directed them to get it acknowledged, that he thought it was not legal until it was acknowledged; that afterwards, on the 4th day of April, 1871, the said John F. McClellan placed upon the mortgage the proper United States revenue stamp, and on the day following acknowledged the execution of the same before a notary public in due form of law, and that the defendant, the mortgagee therein named, then took said mortgage from his said agents, Moss & Trissal, and had it recorded, and on that day, to wit, April 5th, 1871, informed the plaintiff herein that he had, on that day, accepted this mortgage, and that it was junior to the said attachment lien of the plaintiff in the event said attachment was sustained.

The conclusion of law by the court was, that the defendant was entitled to recover, and was entitled to his costs.

We do not think that there was a delivery and acceptance of the mortgage until the 5th of April, 1871. It is true that the court finds that Moss & Trissal were the agents of the mortgagee to accept the mortgage, but it does not appear that they ever accepted it for him. On the contrary, the mortgagee stated, on the 5th of April, that he had on that day accepted it. If his agents had previously accepted it for him, this statement would not have been true. The fact that the mortgagor did not stamp the mortgage until the 4th of April is a circumstance tending to show that it had not been delivered prior to that date. The mortgagee expressly admitted that the mortgage was junior to the attachment lien of the plaintiff. He would not have made this statement, if he or his agents for him had previously received the mortgage. We think the conclusion of law of the court was erroneous.

Morgan et al. v. Olvey et ux.

The judgment is reversed, with costs; and the circuit court is instructed to render judgment for the plaintiff upon the facts found.

MORGAN ET AL. v. OLVEY ET UX.

53	6
136	322
136	687
53	6
139	609
139	700
53	6
154	89
156	402

PARTNERSHIP.—*Real Estate.*—In order that real estate purchased by partners may be treated as not subject to sale as real estate to satisfy the personal debt of one of the partners during the continuance of the partnership and until all partnership debts have been paid, it must have been purchased for partnership purposes.

DEMURRER.—*Practice.*—Sustaining a demurrer to a good paragraph of answer is not an available error, if, on the trial, all the evidence that would be admissible thereunder be introduced without objection.

FRAUD.—*Not to be Presumed.*—Fraud is not to be presumed, but must be established like any other fact in controversy.

SAME.—*Fraudulent Conveyance.*—*Evidence.*—In an action to set aside as fraudulent a conveyance of real estate, and to subject the real estate to sale to satisfy a judgment against the grantor, the necessity of resorting to such real estate should be proved.

From the Hamilton Circuit Court.

T. J. Kane and A. F. Shirts, for appellants.

D. Moss, J. W. Evans and R. R. Stephenson, for appellees.

BUSKIRK, J.—This was a proceeding by the appellees, Elizabeth Olvey and her husband, against James and Elias Morgan, to set aside as fraudulent a conveyance of certain real estate from Elias to James Morgan, and to subject the same to sale to satisfy a judgment in favor of the female plaintiff and against the said Elias Morgan.

There was issue, trial by jury, and verdict for plaintiffs, and, over a motion for a new trial, judgment on the verdict.

The errors assigned call in question the action of the court in overruling a demurrer to the complaint, in sustaining a demurrer to the second paragraph of the separate answer of

James Morgan, and in overruling the motion for a new trial. The complaint is unquestionably good. Hence, the demurrer thereto was properly overruled.

All the facts alleged in the second paragraph of the answer were admissible under the general denial, except the averment that the land in question was purchased by the appellants as partners; and these averments are not sufficient. It is alleged that the land in controversy was purchased by the appellants as partners, they being partners in the purchase and sale of stock, but it is not alleged that it was purchased for partnership purposes.

Real estate purchased by partners, with partnership funds and for partnership purposes, is treated as personalty, and is not subject to be sold as real estate to satisfy the personal debt of one of the partners, during the continuance of the partnership and until the partnership debts are all paid. Partnership property is primarily liable to the payment of partnership debts. The interest of the partners in such partnership property is in the surplus remaining after the payment of partnership debts.

There is no averment that the land in question was necessary or purchased to carry out the objects of the partnership. *Huston v. Neil*, 41 Ind. 504, and authorities there cited. There was no error in sustaining the demurrer to the second paragraph of the answer. Besides, the appellants were permitted, without objection, to prove, under the general denial, all the facts relating to such partnership. If the answer had been good the error would have been a harmless one.

We next inquire whether the court erred in overruling the motion for a new trial.

The appellants complain of the instructions given. We have carefully examined them, and are entirely satisfied that no error was committed of which the appellants can complain.

But the judgment must be reversed for a failure of the evidence to sustain the verdict and judgment. The complaint alleged the recovery of a judgment in the Tipton Cir-

cuit Court by the female plaintiff against Elias Morgan; the filing of a certified copy thereof in the Hamilton Circuit Court, where the land was situated; that Elias had conveyed his undivided interest in said real estate to his father, for the purpose of cheating and defrauding the said judgment plaintiff; that his father had accepted of such conveyance with full knowledge of the fraudulent purpose of the said Elias, and held the same for the fraudulent purpose of preventing the collection of the said judgment; and that the said Elias had no other property that was subject to levy and sale to satisfy said judgment. These averments were sufficient to make the complaint good, but they were not proved upon the trial. The recovery of the judgment, the filing of the transcript, and the conveyance from Elias to James were fully proved by the plaintiffs; but there was no evidence that Elias conveyed, and that James accepted of such conveyance, for the purpose of cheating, hindering, delaying or defrauding the plaintiffs. On the other hand, it was proved by the appellants that the land in question was purchased by James and Elias in partnership, and mostly on credit; that, in consideration of said conveyance, James paid Elias two hundred dollars, and assumed the payment of said partnership debts; that the land was sold for its full value; and that when the conveyance was made James had no knowledge that Elias was indebted to the female plaintiff, the deed having been made before the rendition of the judgment.

There was no attempt made by the appellees to contradict, explain, or in any manner to overcome the evidence offered by the appellants. Nor was there any evidence that Elias did not have other property subject to levy and sale with which said judgment might have been satisfied.

The evidence of the plaintiffs wholly failed to establish fraud, or a necessity of resorting to the property in question. The evidence of the defendants shows a legal and *bona fide* transaction.

Ingerman v. Dietrick.

Fraud is not to be presumed, but must be established like any other fact which may be in controversy.

It is a clear case of failure of evidence to sustain the material averments of the complaint. The judgment cannot be sustained.

The judgment is reversed, with costs; and the cause is remanded for a new trial.

INGERMAN v. DIETRICK.

PLEADING.—*Evidence.*—*Instruction to Jury.*—Where, in an action on a promissory note, brought by the payee against the maker, a paragraph of answer alleged that the note was given for a certain machine sold by the plaintiff to the defendant, and set up as a defence a warranty and the breach thereof, and also fraudulent representations, it was error to instruct the jury that, to sustain said paragraph, there must be proof of the fraudulent representations alleged therein.

From the Hamilton Circuit Court.

J. W. Evans and *R. R. Stephenson*, for appellant.

DOWNEY, C. J.—This was an action by the appellee against the appellant on a promissory note executed by the appellant to the appellee.

Answer: 1. Want of consideration.

2. That the note was given for the right to use and sell a patent saw or cabbage cutter in certain counties of this State. The paragraph alleges fraud in making the sale, and that the invention was not new and useful, whereby there has been a failure of the consideration of the note.

3. This paragraph of the answer was withdrawn.

4. That the consideration of the note was as stated in the second paragraph; that the invention was worthless; that the parties rescinded the contract; that the note was cancelled, and the deed for the patent was properly assigned over to the plaintiff and tendered to him, and the plaintiff

Ingerman v. Dietrick.

fraudulently and without right kept possession of the note.

5. The fifth paragraph sets up false representations and a warranty of the machine and a breach thereof.

Reply in denial. Trial by a jury, verdict for the plaintiff. Motion by the defendant for a new trial. Motion overruled. Final judgment for the plaintiff. The error assigned is the overruling of the motion for a new trial.

The first ground for a new trial urged by the appellant is this: on the trial, the defendant asked one Mosebaugh, a witness, this question: "Did or did not Dietrick, in his testimony on the trial of the Kepner and McGlore trials, in this court, in 1873, deny ever having any conversation whatever with you at the time and place mentioned in your testimony in this cause?"

The plaintiff objected, and the court refused to allow the witness to answer the question. We do not see that there was any substantial error in this ruling. Mosebaugh testified, on the trial of this cause, in contradiction of Dietrick as to the same conversation. We do not see that a repetition of the opposing statements, by showing that they occurred in the other cases, would add anything to the impeaching force of the evidence of the witness.

The next reason for a new trial was the giving of the twelfth instruction, as follows: "12. Or was the contract as stated in the fifth paragraph of the defendant's answer, and did the plaintiff make the false and fraudulent representations therein named, and did the defendant rely upon said representations, and was he damaged thereby? If so, the defendant should recover on that issue. If not, the plaintiff should recover on that issue," etc. The objection urged against the instruction is, that the fifth paragraph of the answer sets up as a defence a warranty and a breach of it, as well as fraud, while the instruction informs the jury, in substance, that, to sustain the paragraph, the defendant must prove false and fraudulent representations of the invention. It seems to us that the instruction is liable to the objection urged. The fifth paragraph of answer is clearly a paragraph

Godman *et al.* v. Meixsel *et al.*

founded on an alleged warranty and the breach thereof, as well as false representations, and it was not necessary for the defendant in his evidence to go beyond the allegations of the warranty. He need not prove fraud to sustain the answer so far as it alleges a warranty.

Other questions presented by the motion for a new trial are argued, but we need not decide them. The questions may not again be presented.

The judgment is reversed, with costs; and the cause is remanded for a new trial.

GODMAN ET AL. v. MEIXEL ET AL.

PLEADING.—*Departure.*—Complaint for money paid, laid out and expended by the plaintiff for the defendant, at his special instance and request, a bill of particulars filed with the complaint being an account for a certain amount of corn purchased at a certain price.

Held, that a reply claiming for money paid by the plaintiff to satisfy a purchaser for a contemplated non-performance of a contract for the delivery of corn by the defendant to such purchaser was not a departure.

CONTRACT.—*Performance.*—A request made by a principal to his commission merchant to buy corn to fill the balance of a quantity of corn which the former had contracted to sell to a third person did not authorize the commission merchant to pay money to the purchaser to discharge the obligation of the seller, it not appearing that the corn was deliverable under the contract at the time the money was so paid.

From the Tippecanoe Civil Circuit Court.

J. M. LaRue, for appellants.

W. D. Wallace, A. A. Rice and J. F. McHugh, for appellees.

DOWNEY, C. J.—There is but one assignment of error in this case which presents any question for decision, and that is, that the court erred in overruling the appellants' demurrer to the first paragraph of the appellees' reply to the second paragraph of the answer.

Godman et al. v. Meixsel et al.

The action was by the appellees against the appellants for balance due for money paid, laid out and expended by the plaintiffs for the defendants, at their special instance and request, and for interest thereon, a bill of particulars of which is filed with the complaint. The disputed item is thus charged: "1873. Sept. 18. To 14,347 $\frac{3}{8}$ bus. corn purchased at 64c., \$9,182.17." Various items are stated in the account before and after this one, and the balance stated is six hundred and eighteen dollars and ninety-six cents.

It is alleged in the second paragraph of the answer, that, as to so much of the plaintiffs' complaint as counts upon the purchase of fourteen thousand three hundred and forty-seven and eight fifty-sixths bushels of corn at sixty-four cents per bushel, the defendants say, that in September, 1873, they were filling a contract for the sale of a large quantity of corn in the city of Baltimore; that because of delays in transportation of corn to said city, the defendants telegraphed said plaintiffs to purchase a sufficient quantity of corn to fill such contract; that the plaintiffs advised these defendants that they could not purchase corn at less than sixty-four cents per bushel, and that they would await orders. These defendants aver that they gave no further orders, but that shortly afterwards, owing to the panic, the price of corn in Baltimore dropped to fifty cents per bushel; and defendants aver that said plaintiffs purchased said corn or furnished the same themselves, and fraudulently claim therefor sixty-four cents per bushel; that said corn was purchased without further orders, and after defendants were advised that plaintiffs would not purchase without further orders. Wherefore, etc.

The first paragraph of the reply to the second paragraph of the answer contains the following averments: that the defendants were, in September, 1873, endeavoring to fill a contract for the sale, theretofore made by them, through the plaintiffs, of a large quantity of corn, in the city of Baltimore, Maryland, as is averred by the defendants in their said paragraph of answer; that on the 17th day of that month their contract remained unfulfilled on their part by

fourteen thousand three hundred and forty-seven and eight fifty-sixths bushels of corn, at which date they telegraphed to plaintiffs, who were and are commission merchants and grain dealers in said city, through whom they (the defendants) had been transacting their business in said city, as follows: "Buy corn to fill balance of our sale." That upon the receipt of this telegram, on the 17th of September, they endeavored to buy the requisite amount of corn to fill said contract, on the best terms possible for the defendants, but found that they could not do so for less than sixty-four cents per bushel; that they also called upon Mr. Radcliff, the purchaser from the defendants, and endeavored to settle with him for the balance of the corn on the most favorable terms possible for the defendants, but found that he would not settle upon a more favorable basis than sixty-four cents per bushel; that they thereupon, in good faith and in the hopes that they might buy at better figures the next day, concluded to wait, and did wait until the next day, the 18th day of September, when they tried the market again, but found, after diligent inquiry, that they could not purchase the balance of the corn required to fill defendants' contract at less than sixty-four cents per bushel, and that the purchaser, Radcliff, would not settle on a more favorable basis than sixty-four cents per bushel; wherefore they, in good faith, and in compliance with the true intent and spirit of said telegram received from the defendants, settled on the said 18th day of September, with the purchaser, Radcliff, for said balance of said corn, on the basis of sixty-four cents per bushel, that being the best they could do, and paid out their own funds therefor, as shown in the complaint, and thereby fulfilled the defendants' contract and relieved them from all further liability on account of the same. They further say that, after finding, on the 17th of September, that they could not buy corn for less than sixty-four cents per bushel, and after having concluded, as aforesaid, to wait until next day, to see if they could not do better, they mailed a

Godman et al. v. Meixsel et al.

letter at Baltimore to the defendants at Lafayette, Indiana, reading as follows, to wit:

“NO. 149 PRATT STREET, BALTIMORE,
“Sept. 17th, 1873.

“MESSRS. GODMAN & TAYLOR, Lafayette, Ind.:

“Gentlemen, Your telegram of this A. M. to hand, as follows: ‘Buy corn to fill balance of our sale.’ We have seen purchaser, who refuses to settle at less than sixty-four cents. This we deem too strong, although there is over fourteen thousand bushels short, and no large lots offering, the stock in elevator being held by shippers. Will try to-morrow, and make a more satisfactory settlement if possible. No sales reported to-day; nominally sixty-three. Likely to have another blockade for want of vessels. Oats steady and rather firm at forty-four to forty-eight. Wheat dull and heavy,” etc.

“Yours truly,

“MEIXSEL & Co.”

And plaintiffs further say, that they deny that they were guilty of any fraud or bad faith in the matter; but aver that they acted in the best of good faith throughout, and with an eye to the best interests, as they thought, of the defendants. They further say that the matters herein set forth are the same identical matters and things complained of by the defendants in their said second paragraph of answer, and for and on account of which they seek for the relief therein prayed. Wherefore, etc.

It is urged by the appellants that the reply departs from the complaint; that the complaint is for money paid for the purchase of corn, giving the number of bushels and pounds, and that the reply claims for money paid to satisfy a purchaser for a contemplated non-performance of a contract for the delivery of corn, and shows that not a pound of corn was actually purchased.

Taking the complaint and bill of particulars together, we think there is no substantial discrepancy between them and the reply, and hence no real departure.

Again, it is insisted that, according to the allegations of the reply, the plaintiffs had no authority to pay money in discharge of the obligation of the defendants to deliver corn, but, by the terms of the instruction contained in the telegram, could only purchase corn to fill the contract. We think this position is well taken. It does not appear that the corn was deliverable on the contract when the money was paid by the plaintiffs. They were not authorized to pay money, but only to buy corn to fill the balance of the contract. For aught that appears, there was no necessity to purchase the corn or to pay the money at the time when the money was paid. We are not required, therefore, to decide whether the plaintiffs might, if the time for the delivery of the corn had arrived, pay the amount in money or not.

The answer alleges that shortly after the time of sending the dispatch, owing to the panic, the price of corn dropped to fifty cents per bushel. If the time for delivering the corn had not arrived when the money was paid, and did not arrive until after the decline in the price, the defendants might have purchased the corn at less than sixty-four cents, or paid for the non-delivery at a reduced rate. The reply should, at least, have shown that the plaintiffs had a right to pay the money for the non-delivery of the corn at the time when the payment was made. But we need not decide whether they would have had a cause of action in that event. But what we do decide is, that upon the facts in the reply the plaintiffs cannot recover.

The judgment is reversed, with costs, and the cause remanded with instructions to sustain the demurrer to the first paragraph of the reply to the second paragraph of the answer.

Logan v. Marquess.

LOGAN v. MARQUESS.

ESTRAY.—*Action by Owner of Animal to Recover Possession.*—The owner of an animal taken up as an estray cannot maintain an action in the circuit court to recover the same from the person who has possession by virtue of his compliance with the provisions of the estray law, until such owner shall have proved his ownership before a justice of the peace, and paid or tendered charges for keeping the animal, as provided by said law.

From the Fountain Circuit Court.

G. McWilliams, for appellant.

BUSKIRK, J.—This case went off in the court below upon a question of jurisdiction. The appellant commenced in the court below an action to recover the possession of a colt, which it is alleged was unlawfully detained by the appellee. The appellee by his answer sought to bring the case within the provision of the eighteenth section of the estray law. 1 G. & H. 325. It was alleged that the colt in question was an estray and had been taken up, and all the steps which had been taken were described with particularity. To this paragraph a demurrer was overruled. Issue, trial by jury, verdict for appellee. Motion for a new trial overruled.

The court instructed the jury as follows:

“That the taker up is not bound to deliver up property once legally in his possession under the provisions of the estray laws, until the alleged owner has brought himself within the provisions of the statute making it the duty of the owner seeking to reclaim such property to prove his ownership of the same before some justice of the peace of the township.”

It was admitted upon the trial that the colt belonged to the plaintiff, and that he had tendered the defendant the sum of twenty-five dollars for the expenses of taking up and keeping the same. It was admitted by the plaintiff that the defendant had complied with all of the provisions of the estray law in taking up the colt, to the time of bringing this action.

The only question, therefore, for the jury to decide was, whether the appellant had the right to bring his action in

Logan v. Marquess.

the circuit court, as he had done, without first proving his property and having the compensation of the taker up determined, and paying the same, before a justice of the peace of the township where the colt was taken up; and the court charged the jury that such action would not lie until the owner had brought himself within the provisions of the estray law, and their verdict was accordingly rendered for the appellee. The question which we are required to decide is whether the court misdirected the jury. The eighteenth section of said act reads: "At any time before sale the owner may have his property by proving the same before the justice of the township where taken up, and paying charges. And at any time within two years after sale, but not later, he may reclaim the money paid into the treasury, by proper proof before the county auditor." 1 G. & H. 325.

The above section should be construed in connection with the sixteenth section of said act, which provides: "Upon property sold or reclaimed, the taker up shall be allowed such compensation for keeping such property as shall be, by the justice before whom the proper proceedings are had, deemed just and reasonable, and such taker up shall keep account of the time any estray animal is kept by him, and make oath to the same."

We think the instruction of the court was in strict accordance with the plain and express requirement of the sections hereinbefore set out. If the taker up of estray property should deliver the same to one who was not the owner, he would be liable to the true owner for the value thereof. These sections were intended for his protection. By the sixteenth section, the taker up is required to keep an account of the time any estray animal is kept by him, which has to be verified by his oath, and the justice of the peace is authorized to fix the compensation to which he is entitled. By the eighteenth section, the owner is entitled to his property by proof of ownership and by paying the charges allowed by

 Nowels v. Alter.

the justice. When the owner has proved his property and paid or tendered the compensation allowed by the justice to the taker up, he is entitled to reclaim the same, and if the taker up should refuse, upon such proof and payment being made, to deliver such property to the owner, he would then be entitled to prosecute an action to recover the possession of the same, together with damages occasioned by the detention subsequent to such refusal. It results that as the appellant had not, prior to the bringing of his action, proved his property and tendered the damages assessed to the taker up, he had no right to maintain his action. The remedy given by the statute is a cheap and convenient one and necessary to the protection of the taker up, as the decision of the justice as to the ownership of the property would protect him in surrendering the property, though it might be erroneous.

The judgment is affirmed, with costs.

53	18
181	205

NOWELS v. ALTER.

HIGHWAY.—Obstruction.—Pleading.—In an action under section 24, p. 592, I G. & H., for obstructing a highway, the complaint should allege that the defendant “unnecessarily and to the hindrance of passengers,” obstructed the highway; and it is not sufficient to allege that he obstructed the highway so as to make it impassable, and so that it could not be travelled and used by the public.

From the Jasper Circuit Court.

S. P. Thompson and ——— *Thompson*, for appellant.

R. S. Dwiggins and *Z. Dwiggins*, for appellee.

DOWNEY, C. J.—This was an action by Alter as trustee of Union township, etc., on relation of Meeker, supervisor, etc., against Nowels, for obstructing a highway. It was commenced before a justice of the peace. The amended

complaint is in two paragraphs, to each of which, in the circuit court, a demurrer was filed by the defendant and overruled by the court. The issue of fact in the cause was tried by a jury, and there was a verdict for the plaintiff. A motion for a new trial was made by the defendant and overruled, and there was final judgment for the plaintiff.

Among other errors assigned, it is alleged that the court improperly overruled the demurrer to the paragraphs of the complaint.

The action is founded on sec. 24, p. 592, 1 G. & H. So much of the section as relates to the case in hand is as follows: "Any person who shall * * * unnecessarily and to the hindrance of passengers, obstruct any highway * * shall forfeit the sum of five dollars, * * * and in case of such obstruction, for every day the same is continued, such sum shall be recovered," etc.

The first paragraph of the complaint is, in substance, as follows:

The plaintiff, etc., complains of said defendant, etc., and says that, on, etc., said defendant built a fence across a public highway, in, etc. Said highway runs from, etc., to, etc., and is known as, etc.; that said defendant built said fence across said public highway about sixty rods east of, etc.; that said fence so built across said public highway by said defendant as aforesaid so obstructed said highway that the same could not be travelled and used by the public; that said defendant obstructed said highway, by building a fence across it, on the 28th day of April, 1874, and said obstruction still remains across said highway, making it impassable and so that the same cannot be travelled and used by the public; that said obstruction of said highway has continued for the space of fifteen days, etc.

The second paragraph of the complaint is not materially different from the first.

The objection is made to the paragraphs of the complaint that they do not allege, in the language of the statute, that the defendant, "unnecessarily and to the hindrance of pas-

Nowels v. Alter.

sengers," obstructed the highway. Counsel for appellee refer us to *Boyer v. The State*, 16 Ind. 451; but that was a criminal action and under a different statute. We think the objection to the paragraphs of the complaint is well made. Every obstruction of a highway is not a violation of the statute upon which the action is founded. The obstruction must be an unnecessary obstruction, and it must be to the hindrance of passengers. It matters not that the public could not have travelled or used the highway. The statute does not speak of the public, but uses the word "passengers," by which we understand such persons as, at the time of the unnecessary obstruction, have occasion to pass along the highway, and would do so but for the obstruction. The allegation of the complaint in *Epler v. Niman*, 5 Ind. 459, and in *Hart v. The Trustees, etc.*, 15 Ind. 226, was in accordance with our view of the case before us.

Questions are made as to the sufficiency of the evidence and as to some of the instructions given, and some of those refused, but we need not consider them. We may remark, however, that the evidence to show the existence of a highway at the point where the fence was erected is far from satisfactory. There had been travel along the route for a number of years, but the land was uninclosed, and the travel had not been all the time in the same place. When the way was obstructed by fallen trees or otherwise, the travellers passed round the obstruction, making a new way in that place. It was at no time worked by the supervisor, nor had the public at any time or in any manner assumed or exercised any control over it. In such cases it would seem that a generous public would choose to acquire the right of way in the legal mode, making compensation to the owner of the land, rather than to take his property from him without making any compensation therefor.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrers to the paragraphs of the complaint.

Helwig v. Jordan.

53	21
127	419

HELWIG v. JORDAN.

NUISANCE. — *Landlord and Tenant. — Injury to Third Person from Use of Demised Real Estate.*—Where the owner of real estate, on which was a kiln for drying lumber, leased said real estate, receiving rent therefor, knowing that the kiln would be used by the lessee for drying lumber, and knowing or having reason to believe that such use would be dangerous to the neighboring house of a third person, and said house was burned by fire communicated from said kiln in such use thereof by the lessee, said owner was liable to said third person for the injury so occasioned.

From the Marion Superior Court.

Harvey & Mattler and Porter, Harrison & Hines, for appellant.

Taylor, Rand & Taylor and Beck & Sullivan, for appellee.

BUSKIRK, J.—The appellee sued the appellant for the recovery of damages occasioned by the burning of plaintiff's house by a fire communicated from a dry-house for drying lumber.

The material facts presented by the record are these: The appellee was the owner of a certain lot in the city of Indianapolis, upon which was erected a dwelling-house and other buildings; that the appellant was the owner of certain lots in said city, separated from the lot of the appellee by an alley fifteen feet in width; that the appellant and one Jackson and one Rider were partners in the business of manufacturing furniture, which was carried on on the lots of the appellant; that in May, 1869, the appellant and his partners, for the purpose of seasoning and drying the lumber used in said business, erected on said lots a kiln for drying lumber, under which was a furnace for burning wood; that in September, 1869, the said partnership was dissolved by the appellant's withdrawing therefrom, the business being carried on by the said Jackson and Rider; that by the terms of said dissolution, the said Jackson and Rider became the owners of said drying-kiln; that at the time of such dissolution the appellant leased the said premises to the said Jack-

Helwig v. Jordan.

son and Rider for the term of three years, reserving rent therefor; that the interest of the said appellant in the said kiln passed to the said Jackson and Rider, in pursuance of the terms of said dissolution, as other personal property, and not as real estate; that the lease merely described the real estate, and then added, "together with the rights, privileges and appurtenances thereunto belonging, to have and to hold the same, for and during the term of three years," etc.; that the said Jackson and Rider took possession of the said premises and continued to occupy the same and use the said kiln until in July, 1870, when the same took fire and was burned up, from which fire was communicated to the buildings of the appellee, by means whereof they were destroyed.

The mere structure itself was not a nuisance or dangerous to any person, but its use and operation as a kiln, at the place where it was situated, was necessarily dangerous to the property of the appellee. There was no agreement, covenant or guaranty on the part of the appellant that his lessees should have the right to continue the use of the said kiln, nor does it expressly appear that he was to receive any rent or profit from the continued use of said kiln; but it does appear that he knew his lessees intended to continue the said business, and that such kiln was necessary to the successful operation thereof. He received rent for the entire premises, which included the kiln, and he is to be presumed to have known or to have reason to believe that his lessees would, under his lease, continue to use the same in the same manner in which it had been used and for the purpose for which it was constructed; and it is to be further presumed that he knew the danger which would result to the property of the appellee by such use.

The question, and the only one, which we are required to decide is, whether, under the facts and circumstances stated, the appellant is liable for the injury inflicted upon the property of the appellee.

This case is reported in 1 Wilson Superior Court Rep. 447. It was there held:

Helwig v. Jordan.

1. The common council cannot, by granting a building permit, thereby authorize the erection of a building to the injury of person or property.

2. One who erects a nuisance is liable for its continuance, as for a new nuisance, as long as it continues, and it is not in his power to release himself therefrom by granting it over to another.

3. One who demises his property for the purpose of having it used in such a way as must prove offensive to others may himself be treated as the author of the mischief.

4. One who erects a nuisance, and afterwards parts with the real estate upon which it is located, either by conveyance with a warranty or covenant that amounts to an affirmance of the nuisance and a grant of its continuance, or leases it on terms by which he derives a benefit or profit from its continuance, or leases his real estate, receiving rent therefor and knowing, or having reason to believe, that the use of the property for the purpose for which it is leased will prove to be injurious to the property of others, or become a nuisance, will be liable to an action for an injury resulting therefrom.

The question involved was quite fully considered in the court below, where the leading cases were cited and reviewed. We think the conclusion reached by the court below was correct. We do not deem it necessary to enter into a review of the authorities, but content ourselves with citing them.

Roswell v. Prior, 12 Mod. 635, also reported in 1 Lord Raymond, 713, and 2 Salk. 460; *Rich v. Basterfield*, 4 C. B. 783; *Rex v. Pedly*, 1 Ad. & E. 822; *Fish v. Dodge*, 4 Denio, 311; *Waggoner v. Jermaine*, 3 Denio, 306; *Blunt v. Aikin*, 15 Wend. 522; *Mayor, etc., of Albany v. Cunliff*, 2 Comst. 174; *Staple v. Spring*, 10 Mass. 74; *Hanse v. Cowing*, 1 Lansing, 288.

The last case cited is clearly distinguishable from the case in judgment. There, the person who had erected the nuisance had conveyed the title without a warranty or covenant that amounted to an affirmance of the nuisance or a grant of

Clough *et al.* v. Thomas *et al.*

its continuance, and parted with the possession before the injury complained of. Here, the appellant owned the real estate on which the kiln was erected. The kiln was erected by himself and his partners for partnership purposes. He sold his interest in the partnership to his partners, and leased the real estate on which the kiln was erected, and received rent therefor. The kiln, when used, was dangerous to the property of others. It is plainly inferable from the facts in the record that the appellant knew that the kiln would be used for drying lumber, and that such use would endanger the property of the appellee. He retained the title to the real estate and derived an income from the use thereof, including the kiln.

The judgment is affirmed, with costs.

PETTIT, J., was absent, and took no part in the decision of this cause.

CLOUGH ET AL. v. THOMAS ET AL.

PARTIES.—*Demurrer.*—*Answer.*—*Promissory Note Assigned Without Endorsement.*—Where a promissory note has been assigned, but not by endorsement, the payee should be made a party defendant in an action on the note by the assignee; but if the payee be not made a party, objection to such defect of parties apparent on the face of the complaint cannot be taken by demurrer assigning insufficiency of the facts stated or by answer, but must be taken by demurrer assigning defect of parties defendants.

SAME.—*Petition to be Made a Party.*—Where such a defect of parties was apparent on the face of a complaint on a promissory note, and objection thereto was not properly taken by the defendant, it was error to refuse to permit the payee to become a party upon her petition alleging that the note was executed to her, that she had been and still was the owner thereof, and that it had been transferred by her husband without authority from her, she being at the time a minor and a married woman.

SAME.—*Rule of Court.*—The fact that such an application to be admitted as a party was made too late under a rule of court could not affect the application, the petitioner not being a party.

53	24
134	604
135	606

53	24
140	227

53	24
150	332

53	24
154	412

Clough et al. v. Thomas et al.

From the Montgomery Circuit Court.

W. P. Britton, M. W. Bruner, P. S. Kennedy and W. T. Brush, for appellants.

T. H. Ristine, — Thomson, S. Claypool, H. C. Newcomb and W. A. Ketcham, for appellees.

DOWNEY, C. J.—William M. Thomas and Joanna Thomas, the appellees, administrators of the estate of James Thomas, deceased, sued Bluford Clough, one of the appellants, on a promissory note. The complaint is in three paragraphs. The first alleges the making of the note by Clough to Eliza J. Dague and the assignment of the note by her to said James Thomas, the decedent, and avers that the note is due and unpaid.

The second alleges the making of the note to said Eliza J. Dague; alleges that she was a minor; that Cyrus A. Dague was her guardian; that the note was for part of the purchase-money of certain real estate owned by the ward and sold to the defendant by the guardian, by order of the proper court; that, as such guardian, the said Cyrus A. Dague had the possession and control of said note; that the note was transferred and assigned by the guardian and by the said Eliza J. Dague, in writing thereon, to said James Thomas, deceased; and that the said note is due, and, except one payment thereon, is unpaid.

The third paragraph alleges the making of the note to said Eliza J. Dague; that she was a minor; that said Cyrus A. Dague was her guardian, and, as such, sold and assigned the note to said James Thomas, deceased, by his assignment; that the note is due and unpaid, etc.

A demurrer applying separately to each paragraph of the complaint, on the ground that the paragraphs did not state facts sufficient to constitute a cause of action, was filed and overruled.

The defendant then answered in two paragraphs. The second was a general denial. The first alleged that the said Eliza J. Dague had never assigned the note as alleged, or

Clough et al. v. Thomas et al.

authorized its assignment; that she was claiming the note as her own, etc., and asking that she be made a party to the action. A demurrer to the first paragraph of the answer was filed by the plaintiff and sustained by the court.

Eliza J. Dague then applied to the court to be made a party to the action, and the court refused to allow her to become a party.

Upon a trial by the court, there was a finding and judgment for the plaintiff.

Error is assigned upon the rulings of the court on the demurrer to the complaint, on the demurrer to the first paragraph of the answer, and on the application of Eliza J. Dague to be made a party to the action.

It is conceded that the ruling of the court on the demurrer to the complaint was correct, the demurrer not having been for defect of parties.

It is urged, however, that the first paragraph of the answer was good and presented the question as to defect of parties. We are not inclined to this opinion. The first paragraph of the complaint does not allege an indorsement of the note by the payee; nor does the third paragraph aver an endorsement by the guardian. Possibly it may be understood from the allegations of the second paragraph of the complaint, that the assignment was by indorsement. It is averred, that it was "in writing thereon." When a note is assigned, but not by endorsement, the payee should be a party. 2 G. & H. 38, sec. 6. But the objection was not presented by demurrer to the complaint, assigning this cause. The demurrer to the complaint was therefore properly overruled.

The defect of parties appearing upon the face of the complaint, and the objection not having been taken by demurrer, it cannot, according to section 54, p. 81, 2 G. & H., be taken by answer. It is only when the matters enumerated in section 50, which specifies the grounds for demurring, do not appear upon the face of the complaint, that the objection

Clough *et al.* v. Thomas *et al.*

can be taken by answer. There was no error in sustaining the demurrer to the answer.

In her petition to become a party to the action, Eliza J. Dague alleged that the note was executed to her; that she was and now is the owner thereof; that the same was transferred by said Cyrus A. Dague, her husband, without any authority from her, she being a minor at the time of the assignment of the note and a married woman; and prays to be made a party to the action.

The court refused this motion, on the ground that the application was made too late under a rule of the court, and because the petition did not state facts sufficient to entitle the petitioner to become a party to the action.

We are of opinion that the court committed an error in refusing to make the petitioner a party to the action. The rule of court could not operate upon the petitioner, as she was not a party to the action. See *Truitt v. Truitt*, 38 Ind. 16. We are of the opinion that the statements of the petition, the truth of which is not questioned, were sufficient to require the court to order the petitioner to be made a party to the action.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the motion of the petitioner to be made a party to the action, and for further proceedings.

ON PETITION FOR A REHEARING.

DOWNEY, C. J.—A petition for a rehearing is filed in this case by the appellee. It is asked that the court grant a rehearing upon the point last decided, the only one decided against the appellee. We think the petition must be overruled. As to the causes of action alleged in the first and third paragraphs of the complaint, it is clear that the payee of the note should have been made a defendant, because it is not stated that the note was assigned by indorsement. See statute referred to in the opinion. It was unfortunate

Sample v. The State, *ex rel.* Brooks.

that this allegation was not made, but this was a fault of the appellees. Then the defendant failed to present the question of want of parties by a demurrer for that cause to these paragraphs of the complaint. In this the cause was badly conducted on the part of the defendant. When Eliza J. Dague asked that the plaintiffs should make her a party to the action, she only asked that they should do what they ought to have done in the first place, and what we think the court should have compelled them to do on her application. The petition is overruled.

Clough et al. v. Miller et al.

From the Montgomery Circuit Court.

W. P. Britton, M. W. Bruner, P. S. Kennedy and W. T. Brush, for appellants.

T. H. Ristine, S. Claypool, H. C. Newcomb and W. A. Ketcham, for appellees.

DOWNEY, C. J.—This case presents the same question decided in *Clough v. Thomas, ante*, p. 24, and for the reason there stated the judgment must be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Petition for a rehearing overruled.

SAMPLE v. THE STATE, EX REL. BROOKS.

BASTARDY.—*Complaint Sworn to Before Notary Public.*—The complaint in a bastardy proceeding may be sworn to before a notary public.

SAME.—*Evidence.—Alibi.*—Where, on the trial of a bastardy proceeding, the relatrix testified positively that the child was begotten by the defend-

Sample v. The State, *ex rel.* Brooks.

ant on a certain night, at a certain place, and there was evidence that she had sexual intercourse with other men in the same month, it was error to refuse to permit the defendant to introduce evidence that he was not at said place on said night, but was at another place.

From the Hancock Circuit Court.

H. J. Dunbar and *J. A. New*, for appellant.

W. R. Hough and *A. W. Hough*, for appellee.

DOWNEY, C. J.—This was a prosecution by the appellee against the appellant for the support of two illegitimate children (twins) of which the relatrix had been delivered, the paternity of which she imputed to the defendant. In the circuit court, the cause was tried by a jury, and there was a verdict as follows: “We, the jury, find for the plaintiff.”

A motion by the defendant for a new trial and also one in arrest of judgment were overruled, and there was final judgment charging the defendant with the support, etc., of the children. The complaint was sworn to before a notary public, and it is urged that this was unauthorized by law. We think there is nothing in this objection. Notaries have power to administer oaths in all matters where an oath is required. Acts 1861, p. 147, copied in 2 G. & H. 576.

On the trial, the relatrix testified most positively that the children were begotten at her house on the night of the 23d of December, 1872; that the defendant came to her house at that time and remained until ten o'clock at night; and that she could not be mistaken as to the time when the children were begotten. She testified that the children were born on the 15th day of September, 1873. She first told defendant of her condition in June, 1873. The defendant proposed to prove, by several competent witnesses, an *alibi* as to the night of the 23d of December, 1872, by showing that he was not at the house of the relatrix on that night, or during any part of it, but was at another place in company with the witnesses. It may be remarked that there was evidence that the relatrix, in the month of December, 1872, had sexual intercourse with several other men.

 Wolf v. The State.

The court excluded the offered evidence, and the defendant excepted.

Counsel for the appellee urge, in support of this ruling, that the particular time when the children were begotten was immaterial, as the action was commenced within the limit fixed by the statute; that the material question was whether the defendant was the father of the children or not. It is true that the question is as stated; but we think the offered evidence had a bearing on that question. Possibly the jury found against the defendant on the ground of the positive statement of the relatrix as to the time when the children were begotten. Had the defendant been allowed to disprove the charge of consorting with the relatrix at the time fixed by her, it is possible that the jury might not have been able to say that he, rather than some other of her male associates, was the father of the children. The tendency of the evidence would certainly have been to weaken the evidence of the relatrix, to say the least of it.

There are other questions made and discussed in the case which are of a more doubtful character, and which we do not deem it necessary to decide.

The judgment is reversed, with costs, and the cause remanded for a new trial.

 WOLF v. THE STATE.

53	30
185	576

53	30
142	423

CRIMINAL LAW.—Arson.—Indictment.—An indictment for arson which charged the defendant with setting fire to “the barn of one Laura Wolf” was not liable to the objection that it did not sufficiently allege that the barn was in the actual possession of the person named, in her own right.

From the Hamilton Circuit Court.

D. Moss and *T. J. Kane*, for appellant.

C. A. Buskirk, Attorney General, for the State.

Meeker *et al.* v. The Board of Commissioners of Fountain Co. *et al.*

DOWNEY, C. J.—This was a prosecution against the appellant for arson, which resulted in a conviction and sentence of the defendant to the state prison, etc.

Two questions are presented and argued in this court:

1. As to the sufficiency of the indictment.
2. As to the sufficiency of the evidence to sustain the conviction.

The charging part of the indictment reads as follows:

“That Jacob H. Wolf, late of said county, on,” etc., “at,” etc., “did then and there unlawfully, feloniously, wilfully and maliciously set fire to the barn of one Laura Wolf, then and there situate, which barn was then and there of the value of two hundred dollars, whereby said barn was entirely consumed by said fire; contrary,” etc. It is urged by counsel for the appellant that the indictment does not sufficiently allege that the barn was in the actual possession of the party named, in her own right, and *Ritchey v. The State*, 7 Blackf. 168, is cited in support of the objection. We think the indictment is not liable to the objection urged. The case cited does not sustain the position that this indictment is defective. The court committed no error in overruling the motion to quash the indictment.

The evidence is voluminous and altogether circumstantial. We have read it carefully in consultation and are of the opinion that we cannot reverse the judgment on the second ground.

The judgment is affirmed, with costs.

MEEKER ET AL. v. THE BOARD OF COMMISSIONERS OF
FOUNTAIN CO. ET AL.

From the Fountain Circuit Court.

W. C. Wilson and J. H. Adams, for appellants.

S. F. Wood and H. H. Dochterman, for appellees.

 Bottorff v. Wise.

DOWNEY, C. J.—The question as to the correctness of the ruling of the circuit court in dismissing an appeal from the action of the board of commissioners of the county cannot be presented without a bill of exceptions setting forth the ground on which the circuit court acted. *Conoway v. Weaver*, 1 Ind. 263; *Engard v. Frazier*, 7 Ind. 154; *Smith v. Smith*, 15 Ind. 315; *Aspinwall v. The Board of Comm'rs, etc.*, 18 Ind. 372; *Wilson v. Truelock*, 19 Ind. 389; *Carr v. Thomas*, 34 Ind. 292; *Burntrager v. McDonald*, 34 Ind. 277; *Dritt v. Dodds*, 35 Ind. 63; *Orr v. Worden*, 10 Ind. 553.

The judgment is affirmed, with costs.

58	38
137	408

 BOTTORFF v. WISE.

MISJOINDER OF CAUSES.—*Action to Recover Real Estate.*—*Damages.*—In an action for the possession of real estate, mesne profits may be recovered as damages; but damages for waste or injury to the freehold are not incident to such action, and the uniting of a suit therefor with such action is a misjoinder of causes, for which, however, the judgment will not be reversed.

SAME.—*Former Recovery.*—A complaint, the body of which was in the usual form of a complaint for the recovery of the possession of real estate, demanded judgment for the recovery of the land and a certain sum as damages for the detention thereof, and for injuries and waste committed thereon by the defendant, and for other proper relief.

Held, it not appearing that any objection was raised in said action to the misjoinder, that the recovery of the plaintiff therein might be pleaded in bar of a subsequent action by the same plaintiff against the same defendant for the recovery of the rents and profits of said land accrued, and damages for timber cut and carried away, and for waste committed on said land, prior to the commencement of said former action.

FORMER ADJUDICATION.—*Presumption.*—*Evidence.*—The presumption that whatever matters were embraced in the issues in an action were determined in the adjudication is not conclusive; and where a former adjudication is relied upon by a party, it is competent for the adverse party to allege and prove by parol what questions were considered and determined by the court or jury in the former action.

From the Harrison Circuit Court.

Bottorff v. Wise.

W. A. Porter, for appellant.

W. T. Jones, S. J. Wright, L. Jordan and H. Jordan, for appellee.

BUSKIRK, J.—This action was brought by the appellant against the appellee, after a recovery in ejectment, to recover the rents and profits of the land, for timber cut and carried away, and for waste committed on said land.

The appellee answered in three paragraphs. The first was in denial. The second and third set up affirmative matter in bar of the action. A demurrer was sustained to the second, and overruled as to the third paragraph. The overruling of the demurrer to the third paragraph is assigned for error.

The appellant replied in three paragraphs. A demurrer was sustained to the third paragraph, and this ruling is assigned for error.

There was a trial by jury, which resulted in a verdict for the appellee. The appellant asked for a new trial, mainly upon the ground that the court excluded evidence which tended to establish the truth of the matters alleged in the third paragraph of the reply.

The third paragraph of the answer set up a former adjudication and recovery of so much of the injuries complained of in the present action as occurred prior to the 14th of March, 1871. It is contended by counsel for appellant that such paragraph of the answer was not good. The complaint in the former action is in the record. It was a possessory action by the appellant against the appellee. The body of the complaint was in the usual form. The prayer was as follows:

“Wherefore, plaintiff demands judgment for the recovery of said lands and fifty dollars damages for the detention thereof, and for injuries and waste committed on said land by the defendant, and for other proper relief.”

The question presented is, whether, under such a complaint, proof was admissible of the rents and profits accrued, and for the damages resulting from waste and other injuries

Bottorff v. Wise.

committed during the time the appellee was in possession of said premises.

Mesne profits may be recovered as damages in an action for possession of real estate. They are incident to the recovery of the possession. But damages for waste or injury to the freehold are not incident to such action, and should not have been united therewith. Sec. 598, 2 G. & H. 283; forms 19 and 20, 2 G. & H. 378; *Woodruff v. Garner*, 27 Ind. 4.

So far as the third paragraph of the answer claimed a recovery for the rents and profits, the claim was properly united with the action to recover the possession; but the claim for damages resulting from waste and injury to the freehold was improperly united. It was a misjoinder of causes of action, but a judgment cannot be reversed for a misjoinder. Sec. 52, 2 G. & H. 81. Nor does it appear that any objection was raised in the possessory action to such misjoinder. The complaint was broad enough to have admitted proof of the waste and other injury to the freehold. The demurrer was properly overruled.

It is, however, claimed by counsel for appellee, that the appellant is estopped by the recitals in the bill of exceptions from asserting that the claim for damages was not involved and decided in the possessory action between these parties. It was admitted on the trial, "that the plaintiff herein brought his action of ejectment on the 14th day of March, 1871, to recover the same lands referred to in the complaint in this action, together with damages for the unlawful detention thereof and for waste," etc.

The above admission shows that the action referred to was brought to recover the possession of the land, mesne profits, and damages resulting from waste; but it does not show that such questions were adjudged and determined.

In the third paragraph of the reply, it was averred that on the trial of the ejectment action between the parties to the present action, no evidence was offered or heard by the court in relation to damages resulting from trespass or waste,

The Marion Township Gravel Road Co. v. Sleeth, Treasurer.

and that the court did not consider or determine any question in reference thereto. To this paragraph a demurrer was sustained, and this ruling is claimed to have been erroneous.

The presumption is, that whatever matters were embraced by the issues were determined, but this presumption is not conclusive. Where a question of former adjudication is relied upon, it is competent for the other party to allege and prove by parol what questions were considered and determined by the court or jury. *Walker v. Houlton*, 5 Blackf. 348; *Hargus v. Goodman*, 12 Ind. 629; *French v. Howard*, 14 Ind. 455; *The I. & C. R. R. Co. v. Clark*, 21 Ind. 150; *Campbell v. Cross*, 39 Ind. 155; *Miles v. Caldwell*, 2 Wal. 35.

The court erred in sustaining the demurrer to the third paragraph of the reply.

It is also claimed that the court erred in excluding evidence of the matters alleged in the third paragraph of the reply. The court, having sustained a demurrer to the said paragraph, properly excluded the evidence offered in support of it.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the third paragraph of the reply, and for further proceedings in accordance with this opinion.

THE MARION TOWNSHIP GRAVEL ROAD CO. v. SLEETH,
TREASURER.

53 35
136 216

TURNPIKE.—Assessments on Land.—Repeal of Statutes.—By the act of March 13th, 1875, Acts 1875, Reg. Sess., 80, repealing the statutes authorizing the making and collecting of assessments on lands for the construction of plank, macadamized or gravel roads, the remedy for the collection of such an assessment and also the lien or right itself were taken away, and the collection of an assessment already placed upon the tax duplicate at

The Marion Township Gravel Road Co. v. Sleeth, Treasurer.

the time of the passage of said repealing act could not be enforced; and the fact that the road had been completed on the faith of such assessment could not affect the operation of the statute.

SAME.—Constitutional Law.—The general statutes authorizing assessments on lands for the construction of plank, macadamized and gravel roads were not contracts between the State and the companies constructing such roads, and the repeal thereof and the divesting, by the repealing statute, of an acquired lien on land did not violate the provision of the Constitution of the United States prohibiting the states from enacting laws which impair the obligation of contracts.

From the Shelby Circuit Court.

O. J. Glessner and *T. W. Woollen*, for appellant.

S. Major and *C. Wright*, for appellee.

DOWNEY, C. J.—This was a proceeding by mandate by the appellant against the appellee.

The petition alleges that the appellant is a corporation duly organized under the act of May 12th, 1852, 1 G. & H. 474, and amendments thereto; that the company had a solvent subscription of five hundred dollars per mile; that an estimate had been made of the cost of construction of their road, being the sum of ten thousand one hundred and twenty dollars; that additional stock was thereupon subscribed, amounting to three-fifths of the estimated cost; that they made due application to the board of commissioners of Shelby county, Indiana, for an order to have assessed the amount of benefits that would result to each tract of land within one and one-half miles of such road on either side thereof, and within like distance of either end thereof, from the construction and maintenance of such proposed road; that the board of commissioners found the necessary facts to be true, and thereupon made an order that said assessment be made, as prayed for in the petition; that afterwards the assessors of benefits made the assessments according to law and reported the same to the auditor; that the notice required was given, and the board of equalization met, but there were no complaints; that the total assessment amounted to ten thousand eight hundred and thirty-six dollars and twenty-one cents; that one-third of said assessment was put upon

The Marion Township Gravel Road Co. v. Sleeth, Treasurer.

the duplicate by the auditor for the year 1874, and the duplicate placed in the hands of the appellee, as treasurer of Shelby county; that on the faith of this assessment, the appellant proceeded to and did complete her road during the year 1874; and that the appellee refuses to collect it. Prayer for a mandate to compel the collection of the assessment.

On filing the petition, an alternative writ of mandate was issued, requiring the appellee to show cause why the mandate should not be made peremptory. The appellee made return, and, among other grounds, he alleged and insisted that the statute authorizing the making and collection of such assessments had been repealed, and that, therefore, he had no authority by law to do the act which he was required to do. A demurrer to the return was overruled, and there was final judgment for the defendant. The ruling of the court on the demurrer to the return is assigned as error.

Conceding that the company was duly organized, and that the assessments were properly made, the question is presented as to the effect of the repeal of the statutes upon the right of the treasurer to collect the assessments.

The repealing act was approved March 13th, 1875, and is found in Acts 1875, p. 80, Regular Session, and is as follows: "That an act repealing an act entitled 'an act to amend sections three and fourteen of an act entitled "an act to allow county commissioners to organize turnpike companies, when three-fifths of the persons representing the real estate within prescribed limits petition for the same, and to levy a tax for its construction, and provide for the same to be free;" approved March 6th, 1865,' approved March 9th, 1867, and all the act entitled, 'an act authorizing the assessment of lands for plank, macadamized and gravel road purposes, prescribing the manner of assessing and collecting the same, and repealing the law on that subject approved March 11th, 1867,' approved May 14th, 1869, be and the same are hereby repealed, except section twenty of said last recited act, and all other laws authorizing an assessment or collec-

The Marion Township Gravel Road Co. v. Sleeth, Treasurer.

tion of any tax or assessment for the construction of any plank, macadamized or gravel road purposes in this State; *Provided, however*, that this act shall in no wise be construed to interfere with assessments heretofore collected or paid for the benefit or construction of any plank, macadamized or gravel road company; *And provided further*, that this act shall in no wise be construed to revive the acts repealed by the act repealed by this act."

The second section declares an emergency and puts the act in force from and after its passage.

If the acts in question are not repealed by this act, it must be because the legislature had not the power to repeal them. The language is clear and appropriate. We do not understand counsel for the appellant to contend that the legislature could not repeal the acts in question as to future cases, but we understand them to claim that, by the making of the assessments, a lien accrued upon the lands assessed, and that the company acquired an indefeasible right to demand the amount assessed.

The first section of the act of 1869 is as follows:

"That any plank, macadamized or gravel road company, organized, or that may hereafter be organized, under and pursuant to any act of this State now in force, authorizing the construction of macadamized and gravel roads, having a valid and solvent subscription of at least three-fifths of the estimated cost of construction of said road, such estimate being first made by a competent and disinterested civil engineer, may petition the board of commissioners of the county or counties in which such proposed road, or any part thereof, is, or may be located, to have assessed the amount of benefit to each tract of land, within one and one-half miles of such road, on either side thereof, and within like distance of either end thereof."

The second and third sections prescribe the manner of making the assessments. The fourth section is as follows:

"It shall be the duty of the county treasurer to collect such assessments at the time and in the manner he collects

The Marion Township Gravel Road Co. v. Sleeth, Treasurer.

other taxes, in annual instalments, as the same may be placed upon his duplicate; and for that purpose the county auditor shall put upon the tax duplicate of each year, commencing with the year in which such assessment is made, if such land has been assessed for one road only, one-third of the whole amount of such assessment. If such land has been assessed for two roads, one-sixth of the whole amount of such assessment. If for three or more roads, one-ninth of the whole amount of such assessment, which amount, when so put upon the tax duplicate, shall constitute a lien on such lands so assessed until paid, and such auditor shall continue the same from year to year, until the whole amount has been put upon such duplicate, and collected. *Provided, however,* that when such company shall have collected an amount sufficient to construct such road, and pay all legitimate expenses, it shall be their duty to notify the auditor of such fact, after which no more of said assessments shall be placed upon the duplicate, or collected by the treasurer, except such a per cent. of the assessment against such lands as the owners thereof shall not at that time have paid their ratable proportion of the entire assessment upon; and it is hereby made the duty of said board of directors, from time to time to order the collection of such amount of such unpaid ratable proportion as they may deem proper, until all persons against whose lands assessments of benefits have been made and not released under the provisions of this act shall have paid their full proportion of said assessment. All funds thus collected after the completion of the road, for which said assessments were made, shall be applied to the keeping up of repairs."

This section declares that the assessment when placed upon the tax duplicate shall constitute a lien on such land so assessed. It appears that one instalment of the assessment was put on the tax duplicate by the auditor before the repealing act of March 13th, 1875, was passed.

It is alleged that the company proceeded to and did complete its road on the faith of the assessments. We cannot

The Marion Township Gravel Road Co. v. Sleeth, Treasurer.

think that this fact can add any strength to the claim of the company. We find no provision of the statute authorizing the assessments which contemplated the construction of the road or the contracting of debts by the company on the faith of the assessments before they were collected. On the contrary, it seems reasonable to suppose that the legislature expected that the company would expend the money after it was collected, and not in anticipation thereof. Had the statute authorized or clearly contemplated the construction of the road or the creation of debts therefor in anticipation of the collection of the assessments, there would have been better ground on which to claim that the law could not be repealed after such road had been constructed or such debts incurred.

When we look for some constitutional limitation or restriction preventing the legislature from repealing the act in question, we can find none, unless it be that clause in the Constitution of the United States which prohibits states from enacting laws which impair the obligation of contracts. Act 1, sec. 10. Is there in this case any contract between the state and the company? We confess our inability to see it, if there is. A contract is an agreement, upon sufficient consideration, between two or more competent parties, to do or to refrain from doing some particular act. We fail to find the essential elements of a contract between the state and the company in the legislation in question and the acts of the company thereunder. This was a general statute. The state did not agree not to repeal it, but, on the contrary, expressly reserved the right to alter, amend or repeal the law under which such companies are organized, whenever it should be deemed conducive to the public good. 1 G. & H. 480, sec. 24. The act authorizing these assessments is, in substance, only an amendment of the act of 1852, under which the company was organized. It conferred upon the company additional rights and powers not given by the original act. The right to repeal, alter or amend the act upon which the company depends for its existence must embrace the

The Marion Township Gravel Road Co. v. Sleeth, Treasurer.

right to repeal or amend the subsequent act, which merely conferred upon the company additional powers.

We are referred by counsel for the appellant to the following authorities:

Stuber's Road, 28 Penn. St. 199; *Dartmouth College v. Woodward*, 4 Wheaton, 518; *Smead v. The Indianapolis, etc., Co.*, 11 Ind. 104; *The Aurora and Laughery, etc., Co. v. Holthouse*, 7 Ind. 59; *The State v. Springfield Township*, 6 Ind. 83; *Armstrong v. The Board of Commissioners of Dearborn Co.*, 4 Blackf. 208; *The President, etc., v. The State*, 1 Blackf. 267.

The counsel for appellee cite the following authorities:

The State v. Cooper, 5 Blackf. 258; *The Board of Com. Allen Co. v. Silvers*, 22 Ind. 491; *Brown v. Buzan*, 24 Ind. 194; *Chapin v. Crusen*, 31 Wis. 209; *Tomlinson v. Jessup*, 15 Wal. 454; *The State v. Town of Bergen*, 5 Vroom, 438; *Lincoln v. The State, ex rel. Wood*, 36 Ind. 161; *Roush v. Morrison*, 47 Ind. 414; *Bailey v. Mason*, 4 Minn. 546; *Butler v. Palmer*, 1 Hill, 324; *North Canal Street Road*, 10 Watts, 351; *Fenelon's Petition*, 7 Penn. St. 173; *McMaster's Petition*, 7 Penn. St. 173; *Church v. Rhodes*, 6 How. Pr. 281; *Bloomer v. Stolley*, 5 McLean, 158; *Lucas v. Board Com. Tippecanoe Co.*, 44 Ind. 524; *Weeks v. City of Milwaukee*, 10 Wis. 242; *Sloan v. The State*, 8 Blackf. 361; *Bailey v. Mayor, etc., of N. Y.*, 3 Hill, 531.

Upon a careful examination of these authorities, we are forced to the conclusion that by the repeal of the statutes authorizing the making of the assessments and the collection thereof, not only the remedy for the collection of the assessments, but also the lien or right itself is taken away. We think this was the result contemplated by the legislature, or they would have inserted in the act a clause saving the right to collect assessments in such cases. If the repealing act is operating unjustly, the remedy must be obtained from the legislature. It cannot be afforded by the courts.

The judgment is affirmed, with costs.

Nichol v. Thomas.

NICHOL V. THOMAS.

RECORD.—*Motion for New Trial.*—A motion for a new trial is a part of the record without being embraced in a bill of exceptions.

SAME.—*Bill of Exceptions.*—In the transcript of a record on appeal to the Supreme Court, immediately after the entry of the judgment, which was rendered on a certain day of the term at which the trial was had, was this entry: "And the defendant now presents to the court his bill of exceptions, which is signed by the court and filed, and is as follows." Then followed a bill of exceptions containing the evidence.

Held, that it was shown when the bill was filed, and that it was a part of the record.

UNSOUND MIND.—*Contract.*—*Evidence.*—On the trial of an action to set aside a deed of conveyance of real estate on account of the insanity of the grantor, evidence tending to prove his sanity or his insanity, previous or subsequent to the execution of the deed, including the record of a subsequent inquisition by which he was found to be insane, is admissible, as tending to show his mental condition at the time of the making of the contract.

REAL ESTATE.—*Action to Recover.*—*Pleading.*—*Equitable Title.*—*Instruction to Jury.*—Where a complaint for the recovery of the possession of real estate is in the usual form of a possessory action, not stating the nature of the plaintiff's title, or where the recovery is sought upon the ground that the plaintiff was insane at the time of the execution of the deed of conveyance under which the defendant claims title, there can be no recovery upon an equitable title; and in such a case, an instruction to the jury treating of the doctrine of trusts was outside of the issues and calculated to mislead the jury, and therefore erroneous.

UNSOUND MIND.—*Contract.*—*Disaffirmance.*—A deed of conveyance of real estate executed by an insane person, apparently of sound mind, before office found, is not void but merely voidable, and vests the title in the grantee, subject to the right of the grantor, upon restoration of his reason, or of his guardian, to affirm or disaffirm the contract. Such disaffirmance must precede the bringing of an action to dispossess the grantee, but such action may be brought without first restoring the consideration to the grantee.

From the Hamilton Circuit Court.

D. Moss, F. M. Trissal and W. Garver, for appellant.

T. J. Kane, A. F. Shirts, J. W. Evans and R. R. Stephenson, for appellee.

BUSKIRK, J.—This was an action by the appellee, as guardian of George Nichol, Sen., against the appellant, to recover

53 49
127 444

53 42
132 484
133 426

53 42
135 508

53 42
137 250
139 74

53 42
142 535

53 42
145 102

53 42
154 372
154 378
156 635

53 42
158 627

53 42
160 31

Nichol v. Thomas.

the possession of land and to quiet the title thereto. The complaint was in two paragraphs.

The first paragraph alleges that the appellee is the duly and legally appointed guardian of George Nichol, Sen., an insane person; that said George Nichol is the owner of the following real estate, situate in Hamilton county, Indiana, to wit: the east half of the south-west quarter of section 31, township 18, range 3; that the defendant has the possession of the same without right, and for seven years last past has unlawfully kept said George Nichol out of possession of the same. The relief demanded in this paragraph is judgment for possession and one thousand dollars damages.

The second paragraph was as follows:

“For a second and further cause of action, the plaintiff says that, on or about the —— day of ——, in the year 1865, the said George Nichol conveyed the following lands, to wit: the east half of the south-west quarter of section 31, township 18, range 3, in Hamilton county, Indiana, to George Nichol and Henry Nichol, who were sons of the plaintiff Nichol; that he afterwards conveyed the same to Henry Nichol. The said Henry Nichol conveyed or transferred his interest in said lands to the defendant, William Nichol, soon after the same had been transferred to the said George and Henry Nichol; that the said defendant, William Nichol, soon after the said transfer to him by the said Henry, took possession of said lands and has ever since retained possession thereof, and claims to be the owner of the same; that said George Nichol, the plaintiff's ward herein, was, at the time he executed said deeds, insane and wholly unable to make a binding contract; and the plaintiff further avers that his said ward has no other estate except said lands and a house and lot in Zionsville, Indiana, upon which to rely for a support; that the said George Nichol makes no claim whatever to said lands, on account of the insanity of the ward of said plaintiff at the time of the execution of said deeds, and is ready and willing to re-convey his interest in the same; that the defendant, William Nichol, at the time

Nichol v. Thomas.

he received his said title from the said Henry Nichol, had full knowledge of the insanity of the said George Nichol, ward of the plaintiff. Wherefore the plaintiff asks that said conveyance so made be set aside and held for naught. A copy of which deeds of conveyance are filed herewith; and as the claim of the defendant, William Nichol, is a cloud upon the title of ward of the plaintiff, he asks that the same be removed, and that his title to said lands be quieted and set at rest, and for all other proper relief."

The defendant answered by the general denial.

The case was tried by a jury, which resulted in a verdict, which is in these words, to wit: "We, the jury, find for the plaintiff, and assess the damages at one cent; and we believe the deeds to be deeds of trust. H. G. Finch, foreman." The court, at the request of the defendant, propounded the following special interrogatory to the jury, viz: "1st. Did not George Nichol, Sen., and Margaret Nichol, his wife, convey the real estate mentioned in the complaint to Henry Nichol, on the 4th day of June, 1867? and did not Henry Nichol convey the same real estate to the defendant, William A. Nichol, on the 20th day of June, 1867?" To this interrogatory the following answer was returned by the jury, viz: "To the first interrogatory we answer yes, but believe that George Nichol, Sen., conveyed it through compulsion, and that Margaret Nichol made the conveyance of her own choice. To the second interrogatory we answer yes." A special bill of exceptions shows that, when the verdict and special finding in answer to the interrogatory were returned into court and read by the judge in the hearing of the jury and counsel for each of the parties to the cause, the defendant, while the jury were together, and before they were discharged from the consideration of the case, demanded that the jury be not discharged, but kept together until the verdict and special finding were made in proper form, and the answer to the special interrogatory be made responsive and unequivocal. Which request the court refused, and received the verdict and special finding, and discharged the

Nichol v. Thomas.

jury from the further consideration of the cause; to which the defendant excepted at the time.

The appellant then moved the court for judgment on the special finding of the jury in answer to the interrogatory propounded by the defendant, notwithstanding the general verdict. This motion was overruled and the ruling excepted to at the time.

The defendant filed a motion for a new trial, assigning eleven causes, as follows:

1. For error of law occurring at the trial, in the admission of the testimony of the following named witnesses upon the subject of the condition of the mind of George Nichol, Sen., subsequent to the execution of the deed mentioned in the complaint (which was shown to have been executed on the 10th day of October, 1865), to wit: the testimony of Frank Imbler, Martha C. Thomas, John DeBruler, Lewis Gregory, Mr. Buchanan, Joseph Essig, William Breedlove and Oliver H. Nichol, to the introduction of whose said testimony, upon the subject aforesaid, the defendant objected at the time, and said objections were overruled, to which ruling of the court the defendant excepted at the time.

2. For error of law occurring at the trial of said cause, by the court refusing to permit the defendant to prove by Dr. J. H. Mendenhall, a physician, the facts offered to be proved by said witness, as shown by an offer to prove made at the time said witness was introduced, to which said refusal the defendant excepted at the time.

3. For error of law occurring at the trial of said cause, in the court permitting the plaintiff to introduce the record of the proceedings of the common pleas court of Hamilton county, showing that George Nichol was adjudged a person of unsound mind in August, 1872, to the introduction of which the defendant objected at the time, which objection the court overruled, to which ruling the defendant excepted at the time.

4. The verdict of the jury is not sustained by the evidence.

Nichol v. Thomas.

5. The verdict of the jury is not sustained by sufficient evidence, and is contrary to law.

6. Error of the court in refusing the demand of the defendant that the verdict and special finding of the jury be made in proper form, and the answer to the interrogatory made full, responsive and unequivocal.

7. For misconduct of the prevailing party in said cause, in this, to wit, that the plaintiff, by his attorney, after the jury had been sworn to try the issues in the cause, and after the defendant had concluded his testimony, without leave of court, and without the knowledge or consent of the defendant, made a material new amendment and alteration in the complaint, as shown by the affidavits of F. M. Trissal and William Garver, filed in support of this reason for a new trial.

8. For error of the court in refusing to give the third instruction, as asked for by the defendant, to which refusal the defendant excepted at the time.

9. For error of the court in giving the third instruction to the jury.

10. For error of the court in giving the sixth instruction to the jury.

11. For error in giving the seventh and eighth instructions to the jury.

This motion for a new trial the court overruled, to which ruling the appellant excepted at the time.

The facts offered to be proved by Dr. J. H. Mendenhall, mentioned in the second reason assigned for a new trial, are shown by the offer to prove made at the time, and are as follows:

“That the witness, a practising physician, had known George Nichol, Sen., for four years past, has had opportunities, and has, during said period, observed the manners and habits of said George Nichol. Has observed him during the periods of excitement and stupor or quiet spells detailed by the witnesses in said cause; that he has treated said George Nichol during said past four years, and has known the con-

Nichol v. Thomas.

dition of his mind during that time; * * * and that, in the opinion of the witness, from his own observations and as a medical expert, said George Nichol is, and for said four years has been, a person of sound mind."

The deed in controversy was executed on the 10th day of October, 1865. It is thus shown that the inquisition of sanity was had some seven years subsequent to the execution of such deed.

The instructions given by the court, to the giving of which the defendant objected at the time, are as follows:

"3. A man may be sane upon all other subjects, and yet afflicted with a delusion upon one which would amount to insanity upon that one. An insane delusion exists when a person conceives something to exist, which, in fact, has no existence, and he is incapable of being reasoned out of this false belief. Such a delusion is partial insanity. And if the deed in question is the offspring of such a delusion, or of general insanity, it is invalid. But if you believe from the evidence that George Nichol was not acting under such a delusion, and not influenced by such an one, or under general insanity, when he executed the deed, it should not be set aside. In other words, if such an insane delusion existed, or general insanity existed, the deed in question must have been the offspring of such insane delusion, or of the general insanity, if it existed at the time, or it should not be set aside.

"6. The real question for you to determine in this case is, whether George Nichol, Sen., at the time he executed the deed, in Rushville, Indiana, was insane, and whether he was insane at the time he executed the deed to Henry Nichol; and, if insane at these times, you should find for the plaintiff; but, if not insane, then you should find for the defendant. And, in determining the question whether he was insane or not, you have a right to take into consideration his conduct and conversations, as detailed by the witnesses, both before and after the execution of these deeds, as well as the facts that occurred at the time of their execution, together

Nichol v. Thomas.

with the opinions of the witnesses on that subject who have testified before you, and the conduct and opinions of the defendant himself, as detailed by the witnesses, and from all these to draw your conclusions. If, on weighing all these facts and circumstances, you think they preponderate in favor of the conclusion that he was of unsound mind, you should find for the plaintiff. If, on the other hand, after considering all these facts and circumstances, you think he was not insane, then you should find for the defendant. The fact that George Nichol, Sen., has, by the proper tribunal, been found insane, if you so find, is a circumstance you may take into consideration in determining whether he was insane or not, at the time of the execution of the deeds referred to

“7. If you find from the evidence that the deed executed by George Nichol, Sen., at Rushville, Indiana, to George and Henry Nichol, was made in trust to them, to be by them kept for the purpose of keeping George Nichol, Sen., from squandering the land, and that this trust was accepted by George and Henry Nichol; and if you further find that the other deed executed by George Nichol, Sen., to Henry Nichol was executed to carry out the same trust, or was made at a time when George Nichol, Sen., was insane, in that event you should find for the plaintiff. While insanity is not to be presumed, yet, when insanity is once shown to exist, its continuance is presumed, and, to avoid its results, the defendant must show, by a preponderance of the evidence, that the insanity had ceased to exist at the time the deed was executed, if the insanity existed before that time.

“8. In this case, if you find that George Nichol, at the time of the execution of the deeds by him, referred to in the case, was insane, then it is no defence to the case that the defendant had paid the full value of the land, if you find that he did pay the full value; but, in that event, the deeds are void.”

The appellant has assigned for error the overruling of the motion for judgment in his favor upon the answers to the

Nichol v. Thomas.

interrogatory submitted by him, notwithstanding the general verdict, and the overruling the motion for a new trial.

We think the court committed no error in overruling the motion for judgment on the special verdict, for the reason that there is no inconsistency between the special and general verdict.

On the 10th day of October, 1865, George Nichol, Sen., and his wife conveyed the land in controversy to George and Henry Nichol, two of his sons, for and in consideration of the sum of eighteen hundred dollars. At the same time, a written agreement was entered into between the parties to such deed, which recited the conveyance of said lands for the consideration expressed in the deed; that said lands were of the actual value of thirty-six hundred dollars; that the said George Nichol, Sen., and his wife were separated; and that said George and Henry, in addition to the consideration expressed in the deed, obligated themselves to support John, Milton and Martha Nichol, minor children of the said grantors in said deed, until they arrived at the age of twenty-one years. The said George and Henry, at the same time, executed to their father a mortgage on said premises to secure the payment of the purchase-money mentioned in said deed, and the performance of the condition mentioned in said agreement. These instruments were executed at Rushville, in this State, where George Nichol, Sen., was then residing with his brother.

The appellant testified that he was a full partner with his brothers, George and Henry, in the purchase of the farm, and went with them to Rushville, but kept himself concealed at the hotel, and did not have his name inserted in the deed and other instruments, because his uncle was hostile to him and would have prevented the sale, if it had been known that he was interested therein. The appellant was in possession of the farm at the time of the sale, under a contract with his father, and he remained in possession afterward.

Nichol v. Thomas.

On the 4th day of June, 1867, the said George Nichol, Sen., he having returned to his farm in Hamilton county, entered satisfaction of the above mentioned mortgage, annulled the agreement for the support of his said three minor children, and conveyed the land in dispute to his said son Henry, for the consideration of eighteen hundred dollars.

On the 20th day of June, 1867, the said Henry conveyed the said premises to the appellant, for the consideration of one dollar. At the time the second deed to Henry was made, the first deed to George and Henry had never been annulled or set aside, but was in full force and effect.

On the 19th day of August, 1869, George Nichol, Jun., and wife conveyed the said premises to the appellant, for the consideration of one dollar.

It is fully shown by the evidence in the cause that the appellant possessed full and accurate knowledge of the mental condition of his father at the times when these several deeds were made. If the first deed was valid, the second was a nullity. If the first vested the title in George and Henry, the grantor could not divest the title of George by conveying it to Henry. If the first deed was voidable for the want of mental capacity, it must have been avoided and set aside in some mode known to the law, before the grantor was authorized to make another conveyance. If the first conveyance was absolutely void, a question to be considered further on, on account of the insanity of the grantor, the second deed to Henry must be held void for the same reason; for it is obvious from the evidence that the mind of the grantor was in a worse condition at the date of the second conveyance than it was when the first was made. The jury found, in answer to interrogatories submitted, that George Nichol, Sen., conveyed the land to Henry on the 4th of June, 1867, and that Henry conveyed it to William A., the appellant, on 20th of the same month. This finding is not, in view of the other facts in the record, inconsistent with, and cannot control the general verdict; for it is quite plain that whatever title Henry had to the land in controversy, he acquired by

virtue of the first deed from the grantor and the subsequent deed from George Nichol, Jun.

We proceed to consider whether the court erred in overruling the motion for a new trial. There are, however, two preliminary questions which have to be disposed of before considering the questions arising on the overruling of the motion for a new trial.

1. It is insisted by counsel for appellee that the motion for a new trial is not properly in the record, for the reason that it is not embodied in the bill of exceptions. There is nothing in the objection. A motion for a new trial is a part of the record without being embraced in a bill of exceptions. A motion for a new trial, the ruling thereon, and the exception taken thereto are embraced under the phrase, "all proper entries made by the clerk," as used in section 559, 2 G. & H. 273. Buskirk's Practice, 254.

2. It is claimed that the bill of exceptions is not a part of the record, because it is not shown when it was filed. The objection is not sustained by the record. The judgment was rendered on the 25th day of the term, and immediately following it is this entry! "And the defendant now presents to the court his bill of exceptions, which is signed by the court and filed, and is as follows." Then follows the bill of exceptions containing the evidence. The bill was signed and filed in term, and is a part of the record.

The first reason for a new trial relates to the admission of evidence tending to prove the insanity of George Nichol, Sen., subsequent to the execution of the deed on the 10th day of October, 1865. We think counsel for appellant are mistaken in their assumption that there was no evidence of the insanity of the grantor at the time of making the deed in question. The evidence of ten or twelve of the witnesses introduced by the appellee, and seven or eight of those introduced by the appellant, very strongly tended to prove that the grantor was, at the time of making said deed, and for fifteen or twenty years prior thereto had been, insane. The inquiry as to the mental condition of the grantor should,

Nichol v. Thomas.

of course, be directed to the time of making the deed. His condition at that time is the question to be decided, and, as tending to prove that fact, his previous conduct and declarations are admissible; and so, by the weight of authority and upon principle, are subsequent acts and declarations, when they denote the mental fact to be proved.

Shailer v. Bumstead, 99 Mass. 112; *Provis v. Reed*, 5 Bing. 435; *Marston v. Roe*, 8 Ad. & E. 14; *Jackson v. Kniffen*, 2 Johns. 31; *Waterman v. Whitney*, 1 Kern. 157; *Comstock v. Hadlyme*, 8 Conn. 254; *Moritz v. Brough*, 16 S. & R. 403; *McTaggart v. Thompson*, 14 Penn. St. 149; *Boylan v. Meeker*, 4 Dutcher, 274; *Cawthorn v. Haynes*, 24 Mo. 236; 3 White & Tud. Lead. Cas. (3d Am. ed.), 503, note; 1 Redfield on Wills, 551, 561; *Rush v. Megee*, 36 Ind. 69.

We think the court committed no error in admitting evidence on the subject of the mental condition of the grantor subsequent to the execution of the deed in question.

The views expressed above dispose of the second and third reasons for a new trial.

The evidence of Dr. Mendenhall was improperly excluded, and the record of the inquisition was properly admitted.

The giving of the third, sixth, seventh and eighth instructions is complained of by counsel for appellant. We think the third and sixth properly express the law. *Rush v. Megee*, *supra*.

So much of the seventh instruction as treats of the doctrine of trust was outside of the issues. The first paragraph of the complaint was in the usual form of a possessory action. It contained no averment of a trust. The facts showing the nature of the title of the appellee were not stated in the complaint. He sought to recover upon a legal title. In such case a recovery cannot be had upon an equitable title. *Stehman v. Crull*, 26 Ind. 436; *Rowe v. Beckett*, 30 Ind. 154; *Brown v. Freed*, 43 Ind. 253.

The second paragraph of the complaint sought a recovery upon the ground that the grantor was insane at the time the deed was made. The title relied upon in this paragraph

Nichol v. Thomas.

was a legal, and not an equitable one. *Brown v. Freed, supra.* Such instruction was calculated to mislead the jury.

Several very important questions are presented by the eighth instruction. By that the jury were instructed that the deed of an insane man, before office found, was absolutely void. This charge was erroneous. The deed of an insane man, before office found, is voidable merely, and may be ratified or disaffirmed by the grantor after he becomes sane. The deed of one who has been found to be insane, and had a guardian appointed, is absolutely void. This proceeds upon the ground that the inquisition and appointment of a guardian are conclusive evidence that such person is incapable of contracting, and is notice to the world. The grantor, at the time of making the deed in question, had not been adjudged to be of unsound mind, and was apparently of sound mind, and his contracts were voidable merely. *Musselman v. Cravens*, 47 Ind. 1, and authorities cited; *Wait v. Maxwell*, 5 Pick. 217; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Gray, 279; *Allis v. Billings*, 6 Met. 415; *Jackson v. Gumaer*, 2 Cow. 552.

The deed in question, being voidable merely, vested the title in the grantee, subject to the right of the grantor, upon the restoration of his reason, or of his guardian, to disaffirm the contract. The grantor remained insane until he was judicially declared to be insane. He, of course, possessed no power either to affirm or disaffirm his conveyance. His guardian possessed the power to affirm or disaffirm, but he did neither. The deed having vested the title in the grantee, he could not be dispossessed until the contract was disaffirmed. The bringing of this action did not amount to disaffirmance. The disaffirmance must precede the bringing of the action. The conveyance of an insane person, but who is apparently sane, stands, in all substantial respects, as the conveyance of an infant. As to what will amount to a disaffirmance, see authorities immediately hereinafter cited: *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68; *Tucker v. Moreland*, 10 Pet. 58.

Shannon v. Bartholomew et ux.

An insane person, or his guardian, may bring an action to recover land, of which a deed was made by him while insane, which deed has not since been ratified or affirmed, without first restoring the consideration to the grantee. *Gibson v. Soper*, 6 Gray, 279; *Foss v. Hildreth*, 10 Allen, 76; 1 Chitty on Cont., 11th ed., 191, note (t).

The eighth instruction is clearly erroneous. The court should have charged the jury that the deed of the grantor was voidable only; that there should have been a disaffirmance of the contract before the action was brought; but that such contract might be disaffirmed, and the land recovered, without first restoring the purchase-money. For this erroneous instruction, as well as for the exclusion of the evidence of Dr. Mendenhall, and the giving of the first part of the seventh instruction, the judgment must be reversed.

There are other questions discussed by counsel, but as they are not likely to arise upon another trial, they need not now be considered.

The judgment is reversed, with costs; and the cause is remanded for a new trial, in accordance with this opinion.

SHANNON v. BARTHOLOMEW ET UX.

MARRIED WOMAN.—*Separate Real Estate.—Pleading.*—A complaint to enforce against the separate real estate of a married woman an alleged indebtedness contracted by her for its improvement, which does not allege that she intended to, or did, charge or agreed to charge the indebtedness against her separate estate, is insufficient; the fact that she caused necessary and proper improvements to be made on her real estate not raising the inference that she intended to create a charge upon it.

From the Dearborn Circuit Court.

J. Schwartz, for appellant.

Givan & Matthews, for appellees.

DOWNEY, C. J.—This was an action by the appellant against the appellees to enforce a claim for building materials against the separate real estate of the female defendant. The complaint was adjudged insufficient, on demurrer thereto. This ruling is assigned as error in this court. It is alleged in the complaint that, on and from the 13th day of January, 1871, until the present time, the said Anna M. Bartholomew has been, and still is, the owner in fee simple of the following described real estate in the city of Lawrenceburgh, etc., describing it; that on said mentioned day, there were erected and standing on said premises a store-room and dwelling-house for the defendants and their family, consisting of a large number of children and servants, and hotel for the accommodation of boarders and travellers, and other buildings; and that the said Anna Mariah found it necessary and determined, and it was in truth and in fact necessary, to improve and repair said buildings so erected and standing on said premises, so as to better accommodate their own family and their customers and increase their facilities for making money therein. And the plaintiff avers, that in the furtherance of said project of improvement and repair of said buildings on said premises, at the special instance and request of the defendant Anna Mariah Bartholomew, he furnished and delivered materials for such purposes, of the kinds and qualities, and to the amount and value of three hundred and ninety-two dollars and thirty-seven and a half cents, as in a bill of particulars herewith filed specifically set forth. The plaintiff further avers, that said materials were all used and employed in and about the improvement and repair of said buildings, and that the same were beneficial to, and greatly enhanced the value thereof, to a much larger amount and value than the cost thereof, and were necessary and proper, and greatly beneficial to the interests of the said Anna Mariah Bartholomew, and the values and prices charged by the plaintiff, in his said bill of particulars, were and are fair and reasonable. The plaintiff further

Shannon v. Bartholomew *et ux.*

avers, that at time of making said contract with said Anna Mariah Bartholomew, her said husband owned and held, and now owns and holds, no property subject to execution, which the plaintiff then, as well as now, well knew, and plaintiff did not rely on any personal liability of either the said Anna Mariah Bartholomew or of her husband, but relied only on the said premises as a security for his claim, in and at the time of making said contract with Anna Maria. The complaint then alleges a demand of payment, and refusal, and asks judgment for four hundred dollars, and that the same be decreed a lien on the said premises, and for other proper relief.

The objection urged against the complaint is, that it does not allege that the female defendant intended to or did charge, or agreed to charge, the indebtedness against her separate estate; that what the plaintiff intended is immaterial, unless the female defendant charged the indebtedness against her separate estate. If this position is not correct, then, whenever the wife causes necessary and proper improvements to be made on her real estate, she creates a charge upon it without any agreement to that effect. It might be, for aught that we can see, a reasonable inference, in such cases, that, as the wife cannot render herself personally liable, she intended to charge her separate estate. But we think this inference has not been indulged. On the contrary, it seems generally to have been held necessary to aver the fact that the indebtedness was charged by the wife upon her separate estate. This averment not appearing in the complaint, we think it insufficient. See *Crickmore v. Breckenridge*, 51 Ind. 294, and the cases therein cited.

The judgment is affirmed, with costs.

Bell v. The Indianapolis, Cincinnati and Lafayette Railroad Co.

BELL v. THE INDIANAPOLIS, CINCINNATI AND LAFAYETTE RAILROAD CO.

53 57
135 581

RAILROAD. — Receiver. — Injury to Person. — Pleading. — To a complaint against a railroad company for injuries received by the plaintiff in being run over by a train of cars of the defendant, it is a sufficient answer that, when the injuries were inflicted on the plaintiff, the railroad, engines, cars and all other property of the company were in the hands and under the control of a receiver duly appointed and acting; and such answer need not set forth a copy of the order of court appointing the receiver.

BILL OF EXCEPTIONS. — Motion to Strike Out. — The action of a court in refusing to strike out a paragraph of a pleading cannot be presented to the Supreme Court without a bill of exceptions.

From the Boone Circuit Court.

W. Griffin, O. S. Hamilton, J. S. Peirce, G. H. Ryman and J. M. Johnston, for appellant.

R. W. Harrison and T. J. Terhune, for appellee.

DOWNEY, C. J. — Suit by the appellant against the appellee for injuries received by him in being run over by a train of cars of the defendant, on or about the 7th day of October, 1872.

The defendant pleaded, as a first paragraph of answer, that, at the time of the alleged grievances, to wit, etc., the entire road, engines, cars, and all the other property, etc., of defendant, together with the entire control and management of the same, were in the hands and possession and under the control of receivers, duly and legally appointed by the Marion Civil Circuit Court, the circuit court of the United States for the district of Indiana, and the common pleas court of the county of Hamilton, in the State of Ohio; and the said receivers were then and there invested with all the corporate rights and franchises of said company, and were then and there using and controlling said property and the business connected therewith, and appointed all necessary officers and agents, etc., to carry on said business, and were then and there running, controlling and managing the same; that in the matter of the Indianapolis and Lafayette Rail-

Bell v. The Indianapolis, Cincinnati and Lafayette Railroad Co.

road Company in bankruptcy, the possession and control of said railroad, and the management of the same, and the employment of agents, were not interfered with by order of the court in bankruptcy, but that the order of said bankrupt court was, after adjudging the company bankrupt, as follows :

“It being shown to the court that a large part or all the property and assets of the bankrupt is in possession of receivers, under the authority of the circuit court of the United States for the district of Indiana, and the common pleas court of Hamilton county, Ohio, it is hereby ordered that the marshal, in executing the warrant of bankruptcy, do not, until further order of the court, interfere with the possession of said receivers.” That the defendant, at the time of the alleged grievances, did not have possession of said railroad property, nor any part thereof; that said grievances, if committed, were so done by said receivers or their agents, and not by the defendant or its agents. Wherefore, etc.

This paragraph of the answer was held good on demurrer thereto, and ultimately there was judgment for the defendant.

The only question on appeal to this court is as to the sufficiency of the first paragraph of the answer. So much of the paragraph as refers to the action of the bankrupt court appears to have been inserted in anticipation of what it was supposed might be alleged by the plaintiff by way of reply. The substance of the paragraph is, that, at the time when the injury was inflicted upon the plaintiff, the railroad, etc., were in the hands and under the control of receivers duly appointed and acting. Is this a sufficient reason why the corporation shall not be held liable for the injury done the plaintiff? Counsel for appellee cite and rely upon *The Ohio and Miss. R. R. Co. v. Davis*, 23 Ind. 553. The authority seems to us to be decisive of the question, and to sustain the ruling of the court below.

Counsel for appellant urge that the paragraph is bad, because it does not set forth a copy of the order of the court

Kitch *et al.* v. The State, *ex rel.* Johnson.

appointing the receivers. This, we think, was unnecessary. *Lytle v. Lytle*, 37 Ind. 281.

It is also urged, that a motion made by the appellant to strike out this paragraph of the answer should have been sustained, on the ground that the matter contained therein could have been given in evidence under the general denial, which was pleaded. This question is not presented by a bill of exceptions, and therefore cannot be considered. For this reason, and possibly for others, there is no error in this part of the record for which the judgment can be reversed.

The judgment is affirmed, with costs.

KITCH ET AL. v. THE STATE, EX REL. JOHNSON.

REVIEW OF JUDGMENT.—*Pleading.*—*Complete Record.*—A complaint to review a judgment must set forth a complete record of the former action.

SAME.—*Exception.*—A complaint to review a judgment for alleged error of the court during the trial must show that in the original action exception to such erroneous ruling was taken by the party seeking to have the judgment reviewed.

From the Grant Circuit Court.

J. Brownlee, for appellants.

A. Steele and *R. T. St. John*, for appellee.

DOWNEY, C. J.—Isaac Johnson, guardian, and successor in that trust of Kitch, sued Kitch and his surety on his bond as guardian, and had judgment in his favor. This action was brought to review that judgment. A demurrer to the complaint was sustained, and there was judgment for the defendant. The sustaining of the demurrer is the error assigned.

The complaint is not for material new matter discovered since the rendition of the judgment, but is for alleged errors

Henderson, Auditor of State, v. The State, *ex rel.* Overman.

of the court, committed during the trial of the cause. No complete record of the former cause is made part of the complaint, nor does it appear that any exception was taken to such rulings by the defendants, in such original action. These are urged as fatal objections to the complaint, and we think they must be so regarded by us. On the first ground of objection, see *Owen v. Cooper*, 46 Ind. 524, and *Davis v. Perry*, 41 Ind. 305. On the second ground, see *Richardson v. Howk*, 45 Ind. 451.

The judgment is affirmed, with costs.

HENDERSON, AUDITOR OF STATE, v. THE STATE, EX REL.
OVERMAN.

53	60
148	564
151	410

53	60
155	4

TAX.—*Congressional Township School Lands Held on Certificate of Sale.*—

Congressional township school lands, which have been sold to one who has paid part of the purchase-money, and has received from the county auditor a certificate of purchase entitling him to a conveyance of the land upon full payment of the purchase-money with interest on the unpaid balance thereof, are not subject to taxation as land before such conveyance, and while the title is held merely by such certificate.

SAME. — *Repayment of Illegal Tax.* — *Auditor of State.* — *Mandate.* — Where taxes on land, the title of which is so held, have been wrongfully assessed and paid, and said purchaser has presented to the auditor of state a properly authenticated certificate of the board of county commissioners of the county wherein such land is situated, that he has been illegally assessed, and has illegally paid taxes on said land for state, school and sinking fund purposes to a certain amount, which has been duly paid to the treasurer of state, and received into the state treasury, and said purchaser has requested said auditor of state to audit such claim and issue a warrant to the treasurer of state for the payment thereof, and the auditor of state has refused to comply with such request, he may be required to do so by a writ of mandate.

From the Marion Civil Circuit Court.

C. A. Buskirk, Attorney General, and R. D. Doyle, for appellant.

Henderson, Auditor of State, *v.* The State, *ex rel.* Overman.

Richmond & Moore, Overman & Beauchamp, J. Brownlee and H. Brownlee, for appellee.

BIDDLE, J.—The relator avers, in his complaint, that, in 1865, he purchased of the proper officers of Tipton county a certain piece of land, described, lying in said county of Tipton, and being a part of the congressional township school lands; that, at the time of the purchase, he paid one-fourth of the purchase-money, the balance of which was to be paid in twenty-five years, with interest; that he received from the auditor of Tipton county a certificate of purchase, as prescribed by law, entitling him to a conveyance of said lands upon full payment of the purchase-money; that said lands have not been conveyed to him or any other person. That after he so purchased said lands, and received said certificate therefor, the proper officers of Tipton county listed said lands for taxation as other lands are listed, and assessed taxes against them, which taxes he has paid to the treasurer of Tipton county, in pursuance of said authority. He also produces and makes a part of his complaint, a certificate of the board of commissioners of Tipton county, that he had illegally been assessed, and had illegally paid taxes on said lands for state, school and sinking fund purposes, to the amount of twenty dollars and sixty cents, which amount had been duly paid to the treasurer of the State of Indiana, and received into the treasury thereof; that, before the commencement of this suit, on the 3d day of February, 1876, he presented said certificate of said county board, showing that he had so illegally paid said taxes on said land, all of which was properly authenticated, to the Hon. Ebenezer Henderson, then and still the auditor of the State of Indiana, and requested of him that he would audit said claim, and issue his proper warrant to the treasurer of state for the payment thereof, which said request said Henderson wholly refused to comply with. Prayer for a writ of mandate against the auditor to compel the issuing of said warrant.

The appellant demurred to the complaint for want of a statement of sufficient facts. His demurrer was overruled;

Henderson, Auditor of State, *v.* The State, *ex rel.* Overman.

he excepted, and abided by his demurrer; upon which the court decreed a writ of mandate, as prayed.

That such lands as those described in the complaint, while the title is held by the purchaser merely by a certificate of the county auditor, were not taxable under a former statute, has been decided in the case of *Willey v. Koons*, 49 Ind. 272.

Whether the amount paid by the purchaser, with the enhanced value of the investment and improvement thereon, could be taxed as personal property, under section 21 of the act approved December 21st, 1872 (Acts of 1872, Spec. Sess. 62), we do not decide, as the question is not before us; but we are of opinion that the land, as such, cannot be lawfully taxed.

Has the appellee pursued the proper remedy? is the next question to be considered.

The act touching taxes wrongfully assessed and collected, approved March 2d, 1853, 1 G. & H. 110, is as follows:

“Sec. 1. That in all cases where any person or persons, body politic or corporate shall appear before the board of commissioners of any county in this State, and establish by proper proof that such person, body politic or corporate has paid any amount of taxes which were wrongfully assessed against such person, body politic or corporate, in such county, it shall be the duty of said board to order the amount so proved to have been paid, to be refunded to said payer from the county treasury, so far as the same was assessed and paid for county taxes.

“Sec. 2. In all cases where a portion of the amount so wrongfully assessed and paid shall have been for state purposes, and shall have been paid into the state treasury, it shall be the duty of the said board of commissioners to certify the amount so proven to have been wrongfully paid to the auditor of state, under the seal of said board of commissioners, and the auditor of state shall thereupon audit the same as a claim against the treasury, and the treasurer of state shall pay the same out of any moneys not otherwise appropriated.”

 Arbuckle *et al.* v. McCoy.

This act does not provide, in terms, that the writ of mandate shall be the proper remedy against the auditor in such cases, but writs of mandate may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust or station. Sec. 739, 2 G. & H. 322.

A writ of mandate is the proper remedy for the state to compel an officer to perform a public duty. *Hamilton v. The State, ex rel. Bates*, 3 Ind. 452. The auditor of state may be compelled by a writ of mandate to issue a certificate, or deed, to the purchaser of a lot from the agent of the state, when the purchaser has tendered the money, has a legal right to possession, and has made the proper demand. *Smith v. Talbott*, 11 Ind. 144. See, also, *Shoemaker v. The Board of Commissioners, etc.*, 36 Ind. 175.

The act, the performance of which was sought to be compelled by the mandate, in the case before us, is one which the law specially enjoins upon the auditor of state, according to the second section of the statute above cited, and a duty resulting from his office. It is a ministerial, and not a judicial act, and we know of no remedy provided by law to relieve the appellant, except the one he has sought in this proceeding. We are of opinion that the complaint is sufficient, and that there is no error in the record.

The judgment is affirmed, with costs.

 ARBUCKLE ET AL. v. MCCOY.

 53
170

 63
539

From the Rush Circuit Court.

B. L. Smith, for appellants.

Sleeth & Study and *Sexton & Cambern*, for appellee.

DOWNEY, C. J.—Where the court has improperly refused to grant a continuance, the ruling must be made a ground

Abshire *et al.* v. The State, *ex rel.* Wilson *et ux.*

of a motion for a new trial, in order to present the question to this court, and then it must be done by assigning as error the overruling of the motion for a new trial. *Carr v. Eaton*, 42 Ind. 385, and cases cited; Buskirk's Pr. 224.

The judgment is affirmed, with five per cent. damages and costs.

ABSHIRE ET AL. v. THE STATE, EX REL. WILSON ET UX.

EVIDENCE.—*Certified Copies of Records.*—A certified copy of the record of a deed or a mortgage is admissible in evidence under section 283, 2 G. & H. 183; and the repeal of section 31, 1 G. & H. 265, by the act of May 4th, 1869, 3 Ind. Stat. 136, did not affect such admissibility.

HUSBAND AND WIFE.—*Survivorship.*—*Choses in Action.*—A promissory note made payable to a husband and wife as the consideration for separate real estate of the wife, upon the death of either of the joint payees, is taken by the other by survivorship.

From the Henry Circuit Court.

J. T. Elliott and *W. H. Elliott*, for appellants.

T. W. Wilson and *W. J. Davis*, for appellees.

BUSKIRK, J.—This was a suit on the bond of the appellant C. Bird Abshire, given in the Court of Common Pleas of Madison county, Indiana, as the guardian of Sarah A. Abshire and William E. Abshire. The suit was commenced on the relation of said Sarah A., who is now the wife of Isaac Wilson, and who joins her husband with her, and William E. Abshire, but the suit as to William E. has been dismissed. The other appellant, Nathan Murphy, executed the bond as the surety of Abshire.

There was issue, trial by the court, a finding for the plaintiffs, and, over a motion for a new trial, judgment was rendered on the finding. Overruling the motion for a new trial is assigned for error. Three of the reasons assigned for a new trial are insisted on here.

Abshire et al. v. The State, ex rel. Wilson et ux.

1. That the court erred in the admission in evidence of certain certified copies of the records of Madison county.

2. That the damages are excessive.

3. That the finding is not sustained by the evidence.

The court admitted in evidence certified copies of certain deeds and mortgages. It is claimed that this was illegal, because section 31 of the act concerning real property and the alienation thereof, 1 G. & H. 265, was expressly repealed by the act of May 4th, 1869, 3 Ind. Stat. 136. But it has been held that certified copies of records are admissible under sec. 283, 2 G. & H. 183, and that the repeal of said section 31, *supra*, in no manner affected the admissibility of such certified copies. *Bowers v. Van Winkle*, 41 Ind. 432, and the numerous cases cited; *Patterson v. Dallas*, 46 Ind. 48. The court committed no error in admitting such evidence.

We proceed to enquire whether the damages are excessive. The material facts are these:

In June, 1852, Eliza Abshire, then the wife of appellant Abshire, was the owner, in her own right, of a tract of land in Madison county, Indiana, which she and her husband then bargained and sold to one Williams, for the sum of one thousand dollars, payable in annual payments of one hundred dollars per year, for which Williams gave ten promissory notes payable jointly to Mrs. Abshire and her husband, and they executed to the purchaser a bond conditioned to make him a deed upon the payment of the purchase-money.

Upon the 20th day of May, 1856, Mrs. Abshire died, intestate, leaving her husband and two children, Sarah Ann, the relator, and William E. Abshire, surviving. At the time of her death, six of said notes remained unpaid, and the title to such land continued in Mrs. Abshire. Subsequent to the death of Mrs. Abshire, her husband was appointed the guardian of his two children, and, acting upon the advice of counsel, charged himself with the sum of seven hundred

Abshire et al. v. The State, ex rel. Wilson et ux.

and forty dollars, that being the principal and interest then due upon said notes.

Subsequent to the death of Mrs. Abshire, Williams, having paid the purchase-money, commenced an action, based upon the title-bond, for the specific performance of the contract, and made Abshire and his two children parties thereto, and the court decreed a specific performance of the contract and appointed a commissioner, who conveyed the said premises to Williams. The power of the court to decree a specific performance of the contract of a married woman for the conveyance of her separate real estate was not questioned in that action, and cannot be in this.

It fully appears from the record that the only property or effects which came into the possession of Abshire, as guardian, was the balance due upon the notes executed by Williams to Mrs. Abshire and her husband, for such real estate, and that the court below held that Abshire was not entitled to any portion of the estate left by Mrs. Abshire, but that the whole of the same descended to, and vested in, her two children. The judgment rendered was for one-half of the amount due upon said notes, with interest and damages.

Two positions are assumed by the learned counsel for appellants:

1. That, as the notes were made payable to husband and wife, they are to be treated as an estate by entireties, and upon the death of the wife survived to the husband, who took the entire estate. Estates by entireties do not exist in reference to personal property, and, in this State, only in a limited form and under a peculiar state of facts as to real estate. *Chandler v. Cheney*, 37 Ind. 391; *Barnes v. Loyd*, 37 Ind. 523; *Jones v. Chandler*, 40 Ind. 588; *Anderson v. Tannehill*, 42 Ind. 141; *Nicholson v. Caress*, 45 Ind. 479; Bishop Married Women, vol. 1, sec. 211. The kindred doctrine of survivorship of choses in action payable to husband and wife will be hereafter considered and decided.

2. It is contended, in the second place, that one-third of

Abshire et al. v. The State, ex rel. Wilson et ux.

the estate of the wife, whether treated as real or personal property, descended to and vested in her husband, and the remaining two-thirds vested in equal proportions in her two children.

It is provided by section 22 of the statute of descents, 1 G. & H. 295, that "if a wife die, testate or intestate, leaving a widower, one-third of her real estate shall descend to him; subject, however, to its proportion of the debts of the wife contracted before marriage."

The fifth section of the act of July 24th, 1853, 1 G. & H. 295, provides, that "the personal property of the wife held by her at the time of her marriage, or acquired during coverture by descent, devise or gift, shall remain her own property to the same extent and under the same rules as her real estate so remains, and on the death of the husband before the wife, such personal property shall go to the wife, and on the death of the wife before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances."

The above section only applies, in terms, to such personal property of the wife as was held by her at the time of her marriage, or was acquired during the coverture by descent, devise or gift, and leaves in force the common law rule in reference to personal property not acquired in one of the modes above indicated. *Noble's Ex'x v. Noble*, 19 Ind. 431; *Clawson v. Clawson's Adm'r*, 25 Ind. 229; *Cummings v. Sharpe*, 21 Ind. 331; *Flenner v. Flenner*, 29 Ind. 564; *Bellows v. Rosenthal*, 31 Ind. 116; *Jenkins v. Flinn*, 37 Ind. 349.

It is conceded that Mrs. Abshire was the owner, in her own right, of the real estate in question, and that if she had continued to own it to the time of her death, it would have descended to her husband and her two children, in equal parts. Treated as realty, it was her separate property. When it was sold voluntarily and with her consent, it became personalty. If the purchase-money had been paid to her, or if the notes had run to her, there is no doubt she would

Abshire et al. v. The State, ex rel. Wilson et ux.

have been the owner of the money or the notes. On the other hand, if the purchase-money had been paid, or the notes had been payable, to her husband, it would have created a strong presumption, which would have required the clearest proof to rebut, that she intended to surrender her separate rights to him, and that he received and held such money or notes for himself, and not in trust for his wife. The transmutation of her separate real estate into personalty divested her separate estate therein, and as the notes did not belong to her at the time of her marriage, and were not received by devise, descent or gift during coverture, she could not hold them as her separate personal property under the fifth section of the act of 1853. The notes being payable to her and her husband, they were neither real estate nor personal chattels in possession, but choses in action, and the surviving joint payee took them by survivorship.

In the investigation of this question, which has been very careful and thorough, and has consumed much time, we have examined a large number of authorities, which have a bearing thereon, and we cite them for the convenience of future reference. *Mahoney v. Bland*, 14 Ind. 176; *Johnson v. Runyon*, 21 Ind. 115; *Cummings v. Sharpe*, 21 Ind. 331; *Clawson v. Clawson's Adm'r*, 25 Ind. 229; *Ireland v. Webber*, 27 Ind. 256; secs. 92, 93 and 94 and notes, and especially note 3 to sec. 93, of 1 Bishop on Married Women; secs. 605 and 606 and notes of same book; Tyler on Inf. and Cov. 376, *et seq.*; *Shields v. Stillman*, 48 Mo. 82; *Gaters v. Madeley*, 6 M. & W. 422; *Dummer v. Pitcher*, 5 Simons, 35; S. C., 2 Myl. & K. 262; *Richardson v. Daggett*, 4 Vt. 336; *Driggs v. Abbott*, 27 Vt. 580; *Barber v. Slade*, 30 Vt. 191; *Scott v. Simes*, 10 Bosw. 314; *The Fourth Ec. Soc. in Middleton v. Mather*, 15 Conn. 587; *Lodge v. Hamilton*, 2 S. & R. 491; *Taggart v. Boldin*, 10 Md. 104; *Hutchins v. Gilman*, 9 N. H. 359; *Siter v. M'Clanachan*, 2 Grat. 280; *Perkins v. Clements*, 1 Pat. & H. (Va.) 141; *Bowie v. Stonestreet*, 6 Md. 418; *Searing v. Searing*, 9 Paige, 283; *Temple v. Williams*,

McCrea v. Kelsey *et al.*

4 Ire. Eq. 39; *McOrory v. Foster*, 1 Iowa (Clarke), 271; *Lay's Ex'rs v. Brown*, 13 B. Mon. 295.

It necessarily and unavoidably results, from the doctrine stated, that the appellants are not liable upon the bond in suit; for, as the notes in question survived to the husband, he cannot be compelled to account to the appellees for the money collected thereon. The money, when collected, became his own.

The judgment is reversed, with costs, and the cause is remanded for another trial, in accordance with this opinion.

McCREA v. KELSEY ET AL.

From the Montgomery Circuit Court.

P. S. Kennedy and *W. T. Brush*, for appellant.

W. P. Britton and *M. W. Bruner*, for appellees.

BIDDLE, J.—Replevin, originally commenced by the appellant against Isaac M. Kelsey, sheriff of Montgomery county, to recover the possession of certain merchandise belonging to the stock of a dry goods store. Afterwards, other persons, claiming an interest in the goods, were admitted as parties to the suit, and are now appellees. Trial, and finding by the court against the appellant. The only questions raised are:

1. Is the finding contrary to law?

2. Is it sustained by the evidence?

If the finding is sustained by the evidence, we cannot see, in this case, how it can be contrary to law.

So the main question is the second one. The evidence is in the record. We have carefully considered it, and are convinced that the finding is right.

The judgment is affirmed, with costs.

Wolcott v. Ensign.

BRADLEY v. THE BRANDYWINE, BOGGSTOWN AND SUGAR CREEK TURNPIKE CO.

From the Shelby Circuit Court.

S. Major, for appellant.

B. F. Love, T. W. Woollen and W. Z. Conner, for appellee.

DOWNEY, C. J.—The only question which need be decided in this case is the same as that decided in *Marion Township Gravel Road Co. v. Sleeth*, ante, p. 35. For the reason there stated, the judgment in this case must be reversed.

The judgment is reversed, with costs, and the cause remanded.

Petition for a rehearing overruled.

WOLCOTT v. ENSIGN.

PLEADING.—*Action on Judgment.—Answer.—Payment.—Collaterals.*—In an action upon a judgment, under a general answer of payment, proof may be made that the plaintiff has received the amount of certain collaterals placed in his hands, or that he has become chargeable therewith, as payment on the judgment; and, therefore, in such an action, there is no error in striking out of a paragraph of answer such special matter of defence, or in sustaining a demurrer to a paragraph of answer which relies thereon, where there remains such a general answer of payment.

From the White Circuit Court.

A. W. Reynolds, E. B. Sellers and A. Wolcott, for appellant.

R. Jones, for appellee.

DOWNEY, C. J.—This was an action by the appellee against the appellant, predicated upon a judgment in favor

Wolcott v. Ensign.

of the plaintiff against the defendant, rendered in the Supreme Court of Orleans county, in the State of New York, on the 18th day of April, 1860.

The defendant answered in seven paragraphs. Demurrers were sustained to the third, fourth, fifth and seventh, and part of the sixth was struck out on motion of the plaintiff. There was a reply in denial of the second and sixth paragraphs.

The issues of fact were tried by the court, without a jury, and there was a finding for the plaintiff, on which final judgment was rendered.

The errors assigned and relied upon are the striking out of part of the sixth paragraph of the answer, and sustaining the demurrer to the seventh.

The defense relied upon was, that the defendant had, before the rendition of the judgment, placed in the hands of the plaintiff certain collaterals, the proceeds of which were to be credited as payment on the debt for which the judgment was rendered; and that the plaintiff had, after the rendition of the judgment, realized the amount of the collaterals, which should now be applied as payment on the debt.

The second paragraph of the answer was a general answer of payment, under which, we think, proof might have been made that the plaintiff had received the amount of the collaterals placed in his hands, or that he had become chargeable therewith, as payment on the judgment, to that extent, and, for this reason, the action of the court in striking out part of the sixth paragraph of the answer, and sustaining the demurrer to the seventh, could not have harmed the defendant. *Reeves v. Plough*, 46 Ind. 350.

The judgment is affirmed, with five per cent. damages and costs.

Petition for a rehearing overruled.

Everett v. Gooding. .

EVERETT v. GOODING.

PRACTICE.—*Substituted Papers.*—*Clerk.*—Authority to order or allow the filing of substituted papers belongs, not to the clerk, but to the court.

SAME.—*Bill of Exceptions.*—When a bill of exceptions is filed as a substitute for one for the filing of which time beyond the term was given, it should appear that the original was filed within the time allowed.

BILL OF EXCEPTIONS.—*Oral Evidence.*—*Clerk.*—After a bill of exceptions has been signed, oral evidence cannot be inserted therein by the clerk, in places wherein he is directed to insert it.

From the Hancock Circuit Court.

R. A. Riley, H. J. Dunbar, W. March, J. W. Gordon and *R. N. Lamb*, for appellant.

N. B. Taylor, F. Rand, E. Taylor, M. M. Ray, G. H. Voss, B. F. Davis and *J. A. Holman*, for appellee.

DOWNEY, C. J.—Action by the appellant against David S. Gooding and Frances M. Gooding, for materials furnished and work performed in the erection of a dwelling-house. After issues formed and before trial, the action was dismissed as to Frances M. Gooding. Issues having been formed, there was a trial by jury, and a verdict for the defendant. A motion by the plaintiff for a new trial was overruled, and there was final judgment for the defendant.

But one error is properly assigned, and that is the overruling of the motion for a new trial. When the motion for a new trial was overruled and judgment rendered, on the 4th day of March, 1871, time was given in which to file the bill of exceptions until the first Monday of June, 1871. The record does not show that any bill of exceptions was ever filed, but it does show that on the 13th day of November, 1874, what is denominated a substituted bill of exceptions was filed in the clerk's office.

The questions presented in the motion for a new trial and argued by counsel for appellant all depend upon the bill of exceptions. We think it quite clear that the bill of exceptions cannot be regarded as in the record. The clerk has no authority to order or allow the filing of substituted

Sherlock *et al.* v. The First National Bank of Bloomington.

papers. That must be done by the court. Had the substituted bill of exceptions been filed by the leave and order of the court, it still seems to us that it should appear that the original was filed within the time allowed. The bill of exceptions which is copied in the record is imperfect. The evidence, which was oral, was not copied into the bill of exceptions before it was signed, but places were left where the clerk was directed to insert it. This cannot be done. Buskirk's Prac. 153, and authorities cited.

There is no question in the record for our decision.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

SHERLOCK ET AL. v. THE FIRST NATIONAL BANK OF
BLOOMINGTON

BILL OF EXCEPTIONS.—*Filing.*—Where, time beyond the term having been given in which to file a bill of exceptions, a bill has been filed, but it does not appear at what time it was filed, or that it was filed within the time limited, it does not constitute a part of the record.

INSTRUCTIONS TO JURY.—*Exception.*—Where general instructions are given by the court to the jury, embracing several distinct propositions, an exception cannot be taken to the entire series by noting at the close thereof an exception as provided in section 325 of the code; but such exception must be noted at the close of each distinct proposition. Such distinct propositions should be numbered as separate instructions, and either party may require that this be done.

From the Monroe Circuit Court.

F. Wilson and *M. F. Dunn*, for appellants.

J. W. Buskirk and *H. C. Duncan*, for appellee.

WORDEN, J.—Action by the appellee against the appellants and others, upon a promissory note.

The appellants pleaded, severally, *non est factum*, under

Sherlock *et al.* v. The First National Bank of Bloomington.

oath. On the trial of the issue by a jury, there was a verdict and judgment for the plaintiff.

The appellants make points in relation to the evidence, but the evidence cannot be regarded as in the record. Sixty days were given in which to file a bill of exceptions, and a bill was filed setting out evidence; but the time at which the bill was filed does not appear, nor does it in any way appear that it was filed within the time limited. The bill of exceptions, therefore, constitutes no part of the record. Busk. Prac. 144, and cases there cited.

The appellants object to certain instructions given, but there was no proper exception taken to the instructions.

The court gave general instructions to the jury, involving a number of distinct propositions. These were properly signed by the judge; and, after the judge's signature, it was noted that they were "given by the court, and excepted to by the defendants, Sherlock and Chambers," and this was signed by their counsel. But the instructions were not numbered, as they clearly should be, where they embrace distinct propositions. The statute provides, that "when the argument of the cause is concluded, the court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge, if required by either party." 2 G. & H. 198, sec. 324, fifth clause. Then it is provided, by the next following section, that "a party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write at the close of each instruction, 'refused and excepted to,' or 'given and excepted to,' which shall be signed by the party or his attorney."

It was not the intention that exception should be thus taken, *en masse*, to an entire series of instructions, but that the exception should be noted at the "close of each instruction." Hence, the statute requires them to be numbered, which might have been required by either of the parties; and they should be so separated and numbered, as that each charge, or number, shall contain, as near as may be, but one

Cabel et al. v. McCafferty et al.

entire proposition. Where the charges are thus separated and numbered, counsel can at once determine to which they wish to except; and should exception be taken to each, the court will be advised that all are excepted to, and not be compelled to grope in the dark for supposed errors, lurking somewhere in the series of charges; but not located, by the exception, upon any particular one.

What we have said disposes of all the questions involved in the case.

The judgment below is affirmed, with costs, and five per cent. damages.

BUSKIRK, J., was absent.

CABEL ET AL. v. MCCAFFERTY ET AL.

COUNTY TREASURER.—*Suit on Official Bond.—Payment by Sureties.—Pleading.*—Where a county treasurer, at the expiration of his term of office, has failed to deliver to his successor public money in his possession as treasurer, it is the duty of the county auditor, upon being so required by the board of county commissioners, to bring suit, as relator, upon the official bond of said treasurer for such failure; and said auditor may compromise such suit so brought by him, and receive the money so agreed to be paid; and upon the compromise of such a suit, and the payment by the sureties on said bond of the money so found to be due, such sureties, in an action brought by them against said treasurer to recover the amount so paid by them, need not allege that such payment was made to said treasurer's successor in office. In such an action by sureties, it was a sufficient allegation of such payment by them, that "the plaintiffs paid to the commissioners of said county and auditor of said county and their attorney of record in said suit, and, on," etc., "in fact and in truth, did pay over, to the persons authorized to receive the same, the aforesaid sum," etc.

From the Daviess Circuit Court.

J. W. Burton, for appellants.

J. Baker and *O. F. Baker*, for appellees.

BUSKIRK, J.—This was an action by the appellants, who

Cabel et al. v. McCafferty et al.

were sureties upon the bond of George W. McCafferty, as treasurer of Daviess county, against the said McCafferty, his wife and Patrick L. Crane, the purpose of which was to recover from the said McCafferty a sum of money which they had been compelled to pay for him as his sureties, and to require the said Crane to pay to them a judgment, which had been rendered in favor of the wife of the said McCafferty, and against the said Crane, upon the grounds of the insolvency of the said McCafferty and the fraudulent assignment by him to his wife of the indebtedness upon which said judgment was rendered.

A demurrer was sustained to the complaint, to which ruling an exception was taken. There was final judgment on demurrer.

The only error assigned is based upon the action of the court in sustaining the demurrer to the complaint.

The only question discussed by counsel is, whether the complaint shows a valid payment by the appellants, as the sureties of the said McCafferty. The complaint alleges the election of the said McCafferty, the execution of his bond as such treasurer, his failure to pay over money by him collected, his fraudulent assignment of the debt against Crane, the commencement of an action upon the bond of McCafferty, and the compromise of such action, and the payment by the appellants of the sum found to be due.

We quote from the complaint that portion of it which bears upon the question relied upon and discussed by counsel:

“ And thereupon the board of commissioners of said county of Daviess made an order, instructing the auditor of said county to cause suit to be instituted against the plaintiffs on said bond; and that during the pendency of said suit in the Daviess Circuit Court, Indiana, the plaintiffs paid to the commissioners of said county and auditor of said county and their attorney of record in said suit, and, on the 8th day of June, 1872, in fact and in truth, did pay over to the persons authorized to receive the same, the aforesaid sum of eight

hundred and nineteen dollars and sixty-two cents (\$819.62), in manner and form as aforesaid.”

It is contended by counsel for appellees, that the payment should have been made to the successor in office of the said McCafferty, and, in support thereof, they rely upon section 13 of an act in relation to county treasurers, 1 G. & H. 642, which reads:

“The treasurer shall annually make complete settlement with the board of county commissioners, at the regular June term thereof, and shall, at the expiration of his term, deliver to his successor all public money, books and papers in his possession.”

It is unquestionably true that it was the duty of said McCafferty to make a settlement, and pay over the money, and deliver the books, as required by the above section; but the question before us is, whose duty it was to commence suit upon his bond, for his failure to perform the acts required of him by the statute above quoted.

It is well settled by the statute, and by repeated decisions of this court, that it is the duty of the county auditor, whenever required by the board of commissioners, to bring suit upon the bond of a county treasurer, for a failure to make a settlement, or to pay to his successor any money in his hands at the expiration of his term of office, or to deliver any books or papers. Sections 126, 127 and 128, 1 G. & H. 102; *Snyder v. The State, ex rel. etc.*, 21 Ind. 77; *Pepper v. The State, ex rel. Harvey*, 22 Ind. 399; *Taggart v. The State, ex rel. Jackson Township*, 49 Ind. 42; *Taggart v. The State, ex rel. Van Buren Township*, 49 Ind. 45. See five other cases of *Taggart v. The State, ex rel., etc.*, 49 Ind. 46, 47, 48, 49 and 50; *Scotten v. The State, ex rel. Simonton, Auditor*, 51 Ind. 52.

The action was properly brought on the relation of the county auditor. He was, therefore, authorized to compromise the suit and receive the money agreed to be paid.

The court erred in sustaining the demurrer to the complaint.

Wingate v. Wilson.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings.

WINGATE v. WILSON.

DEMURRER.—*Amendment.*—*Waiver.*—Error in sustaining a demurrer to a pleading is waived by subsequent amendment of the pleading.

PRINCIPAL AND SURETY.—*Extension of Time of Stay of Execution.*—*Appeal Bond.*—*Burden of Proof.*—Upon an appeal from a justice of the peace by the defendant, judgment was rendered against the defendant for a certain sum, being more than five dollars less than the amount of the judgment rendered against him by the justice, and, including costs, which were adjudged against the defendant, less than one hundred dollars, it being further adjudged that execution should not issue until the expiration of six months, said judgment being rendered by agreement of parties, without the knowledge or consent of the surety on the appeal bond.

Held, that such extension of the time of stay of execution discharged said surety.

Held, also, in an action on said appeal bond, the surety relying on such defence, that the burden of proving that he had notice of said extension and consented thereto was upon the plaintiff.

From the Jay Circuit Court.

J. W. Hendington, for appellant.

J. Bishop and *J. J. M. LaFollette*, for appellee.

WORDEN, J.—Wilson, the appellee, recovered a judgment, before a justice of the peace, against James C. Williamson and Aaron Shaw, for a little over ninety-seven dollars, and the defendants therein appealed the cause to the court of common pleas of Jay county, the appellant, Wingate, being surety on the appeal bond.

This action was upon the bond. Such proceedings were had, as that final judgment was rendered against Shaw and Wingate, the latter of whom appeals.

The appellant has assigned for error, amongst other things, the sustaining of a demurrer to the second paragraph of his answer.

After the demurrer was sustained, the defendant amended and refiled the paragraph, and a demurrer was overruled to the paragraph as amended. If any error was committed in sustaining the demurrer to the original paragraph, it was waived by the amendment. The appellant should have stood upon the original pleading, in order to avail himself of any error in the ruling on the demurrer. Busk. Prac. 286, and authorities there collected.

There is no other question in the case, except that arising upon the motion for a new trial.

The cause appealed to the court of common pleas was disposed of as shown by the following entry of judgment therein, viz.:

“By agreement of parties, judgment is rendered against the defendants for the sum of eighty dollars and costs; and no execution to issue until the expiration of six months. It is therefore considered and adjudged by the court, that the plaintiff recover of and from the defendants the sum of eighty dollars damages, waiving valuation and appraisement laws, and likewise his costs in this cause paid, laid out and expended, taxed at — dollars. And it is further ordered and adjudged by the court that the defendants have six months’ time on the above judgment, before execution issue.”

It appears, by an execution issued upon the judgment, that the whole costs in the cause, up to the time of the issuing of the execution, was only ten dollars and forty-five cents; so that the original judgment must have been for less than one hundred dollars, including costs. On a judgment not exceeding one hundred dollars, including costs, there can be a stay of execution for only one hundred and fifty days, by putting in bail for the stay of execution. 2 G. & H. 233, sec. 420.

The appellee, by the agreement embodied in the judg-

Wingate v. Wilson.

ment, tied up his hands and deprived himself of the right to issue execution for a month longer than it could have been stayed by replevin bail.

We are not, therefore, called upon to determine what would have been the effect of the agreement, had it only stayed execution for the same or a shorter time than is allowed by law for a stay, upon bail being put in.

It is established by numerous cases in this court and elsewhere, that, if the creditor and the principal make a new contract, based upon a sufficient consideration, for an extension of time for payment, for a definite period beyond that contemplated by the original contract, without the knowledge and consent of the surety, the latter is thereby discharged. The principle, it seems to us, is entirely applicable to this case.

If the appellee had not, by the agreement, disabled himself to issue execution for the six months, he might, perhaps, within that time have realized his money, either by a voluntary or coerced payment, and thereby relieved the surety upon the appeal bond from obligation. The agreement for time, it sufficiently appears, was based upon a valid consideration. It was a part of the agreement by which judgment was to be entered for the appellee. Moreover, the judgment before the justice was reduced more than five dollars. This, without the agreement, would have entitled the defendants in that action to a judgment for costs against the plaintiff therein, the appellee here. Nevertheless, under the agreement, judgment was rendered for the plaintiff against the defendants in that action for the eighty dollars and costs. This, of itself, would be a sufficient consideration for the agreement as to extension of time. It does not appear that the appellant had any knowledge of, or consented to, the agreement. The burden of proof, as we think, was upon the appellee, to show that the appellant had notice of the agreement and consented thereto.

It may be observed that the appellant pleaded the sub-

Hight *et ux.* v. Langdon.

stance of the foregoing facts, in the amended second paragraph of his answer.

We may further remark that we have no brief for the appellee, and are not advised upon what ground the appellant was supposed to remain liable.

In our opinion, the motion of the appellant for a new trial should have been granted.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

HIGHT ET UX. v. LANGDON.

JURY. — *Discharge of Regular Panel. — Interest of Officers Selecting Jury.*—

Where the circuit court, after the first day of the term, has discharged the regular jury and caused another jury to be summoned, on the ground that one of the officers who participated in the selection of such regular panel is interested in a suit pending in said court, a party to another suit may object to going to trial before such newly-summoned jury and demand that his cause be tried by said original jury, so discharged on motion of an attorney not connected with said other suit.

From the Monroe Circuit Court.

Buskirk & Duncan, for appellants.

McNutt & Hunter, for appellee.

PETTIT, J.—This suit was brought by the appellee, Samuel P. Langdon, against the appellants, Wallace Hight and Emily Hight, his wife, on a note given by Wallace Hight, and to foreclose a mortgage on real estate given by both the appellants to secure the payment of the note.

Proper issues were formed, trial by jury, verdict, judgment and decree of foreclosure rendered. It is proper to say that the proceedings were had in 1874, that the action of

Hight *et ux.* v. Langdon.

the court below may be understood to be governed and controlled by the law then in force. A regular jury had been drawn, summoned and brought into court; and, on the 6th day of the term, the prosecuting attorney, but in no way connected with this case, moved the court to quash and set aside the regular panel of the jury, because the clerk of the court, one of the officers whose duty it was to select and draw the jury, had a suit pending in the court at the time of drawing the jury. This motion the court sustained, and ordered a new jury summoned, which was done.

On the fifteenth day of the term, this case was called for trial, and the defendants, appellants, asked and demanded that the case should be tried by the original and regular jury, and objected to being tried by the new jury. This demand and objection was overruled, and the legality of this ruling is properly before us.

The law authorizes the court, on the first day of the term, to set aside a jury, where one of the officers who acts in its drawing has a suit pending in the court at the time, on proof thereof. 2 G. & H. 30, sec. 1.

This motion, proof and order to set aside the original jury, not having been made on the first day of the term, we hold was too late, and that the appellants were not bound to go to trial before the newly summoned jury. Without this provision, the court would have no right to set aside the jury and call another for this cause; and we think, therefore, it must and can only be done within the time prescribed by the law.

The judgment is reversed, at the costs of the appellee, with instruction to grant the appellants a new trial.

BUSKIRK, J., was absent.

MARSHALL v. BEEBER ET AL.

BILL OF EXCEPTIONS.—*Time of Filing.*—A bill of exceptions, for the filing of which no time has been given, cannot be filed after the term.

NEW TRIAL.—*Motion.*—*Striking Out Pleading.*—Error in striking out a pleading is not a cause for a new trial.

SALE.—*Sale of Goods by One Not the Owner.*—The fact that one has purchased goods from another and received them as the goods of the latter, will not, if, in fact, they were the property of a third person, relieve such purchaser from liability to pay such third person for said goods.

53	83
135	675
53	83
145	617
53	83
151	406

From the Grant Circuit Court.

J. A. Cotton and *R. W. Bailey*, for appellant.

I. Van Devanter, *J. F. McDowell* and *D. V. Burns*, for appellees.

DOWNEY, C. J.—Action by the appellees against the appellant for the price of lumber sold and delivered. The defendant answered in three paragraphs.

On motion of the plaintiffs, the court struck out and set aside the first and third paragraphs of the answer.

There was a trial by jury of the issue formed by the second paragraph of the answer, which was a general denial, and a verdict for the plaintiffs. A motion by the defendant for a new trial was overruled, and there was final judgment for the amount of the verdict.

Two errors are properly assigned:

1. Striking out the first and third paragraphs of the answer.

2. Refusing to grant a new trial.

As to the first assignment of error, the point is made that no time was given in which to file the bill of exceptions upon this ruling, and it was not filed until after the term, and more than thirty days after the ruling. We think this position is well taken. The rule is statutory. 2 G. & H. 209, sec. 343. *The Logansport Gas Light and Coke Co. v. Davidson*, 51 Ind. 472.

Several grounds for a new trial were stated in the motion. Among others, it was urged, that the court had erred in

Marshall v. Beeber et al.

striking out the first and third paragraphs of the answer. This, however, is no ground for a new trial, as has frequently been decided.

It was further urged, that the court improperly refused to give two instructions asked by the defendant. The first was as follows:

“If the jury find, from all the evidence, that the defendant purchased the lumber in question from Sayles, and received the lumber as the lumber of Sayles, you should find for the defendant.”

The fact that the defendant purchased the lumber of Sayles, and received it as the lumber of Sayles, if, in fact, it was not the lumber of Sayles, but was the lumber of the plaintiffs, could not shield him from liability to pay the plaintiffs for it. The instruction was properly refused.

The other instruction asked was as follows:

“If you find that the plaintiffs shipped to defendant, at Philadelphia, the lumber in controversy, and the freights of the railroad company were not paid within a reasonable time, the railroad company would have the right to sell the lumber for their freight; and that if the defendant was compelled, without an opportunity of seeing and examining the lumber, to pay the freight thereon, and the lumber, upon examination, proved not to be of the quality for which he contracted, he would be subrogated to the rights of the railroad company, and could, if the freights were not paid him, sell the lumber, and would only be bound to account to plaintiffs for the excess of money received after deducting necessary expenses.”

The plaintiffs claim to have sold the lumber to the defendant, through the defendant's agent, Sayles, at twenty-eight dollars per thousand feet, delivered on the cars at Rochester, Indiana, payable when the lumber reached Philadelphia, where Marshall did business.

The defendant insists that he purchased the lumber from Sayles, and not from the plaintiffs. The evidence shows, however, pretty clearly, that the defendant was fully

Brown *et al.* v. Keyser.

informed, before the lumber reached Philadelphia, that it belonged to the plaintiffs and was shipped to him by them and on their account. Yet he paid the freight, received the lumber, and, through his broker or agent there, sold the same upon his own account.

Upon this state of facts, it seems clear to us that there was no error in refusing the instruction in question. As to the instruction given, of which complaint is made, we do not find that it is properly in the record, or any question as to it reserved in any legal mode.

It is urged that the evidence was not sufficient to sustain the verdict, that the verdict was contrary to law, and the damages excessive. But we do not think there is anything in any of these grounds which should cause a reversal of the judgment.

The judgment is affirmed, with two per cent. damages and costs.

BROWN ET AL. v. KEYSER.

REVIEW OF JUDGMENT.—*Partition*.—*Infancy*.—An infant defendant in a proceeding for the partition of real estate, who is not served with summons notifying him of its pendency, and whose guardian does not attend and approve the partition, he and his guardian having no actual knowledge of the proceeding until after its determination, may not have a review of the partition within one year after the removal of his disability, without showing sufficient cause.

SAME.—*Appeal*.—*Final Judgment*.—A judgment in a proceeding to review a former judgment, either granting or refusing the review, puts an end to the action for a review, and is a judgment from which an appeal will lie to the Supreme Court.

53	85
135	228

From the Hamilton Circuit Court.

D. Moss and T. J. Kane, for appellants.

W. Garver and J. S. Losey, for appellee.

WORDEN, J.—This was a complaint by the appellee,

Brown et al. v. Keyser.

Henry T. Keyser, to review a certain judgment and proceedings in partition. The ground upon which the review was sought was the alleged inequality and unfairness of the partition, brought about, as is alleged, by the fraud of some of the parties; and the fact that no summons was served on the appellee, Keyser, in the partition suit; that he had no notice of the suit; that he was then a minor; and that his guardian did not attend and approve the partition.

Issues of fact were formed, and the cause was tried by the court, who, at the request of the defendants, made a special finding of the facts and conclusions of law thereon, as follows:

“1. That, at the date of the commencement and determination of the partition proceedings sought to be reviewed in this cause, the plaintiff was, and still is, an owner of the share of said lands alleged in the complaint herein.

“2. That, at the commencement and determination of said partition proceedings, said plaintiff was under twenty-one years of age; that he was not served with summons notifying him of the pendency of said proceedings; that his guardian did not attend and approve said partition; and that neither the guardian of the plaintiff nor the plaintiff had any actual knowledge of the pendency of said partition proceedings, until after the same were determined; but that there was a publication, as shown in the record of said proceedings sought to be reviewed.

“3. That this suit for a review of said partition proceedings was commenced within one year after the removal of said disability of said plaintiff.”

These findings are signed by the judge; then follow the conclusions of law thereon, also signed by the judge, viz:

“And the court further finds, as the conclusions of law arising upon said facts, that the said Henry T. Keyser is entitled to a review of the said partition proceedings and judgment therein. To all of which conclusions of law the defendants excepted at the time.”

This is followed by a judgment that the proceedings and

judgment in the partition suit be reviewed, opened up and set aside, and declared null and void; and that said cause be placed upon the docket for trial and determination, etc.

It is assigned for error, amongst other things, that the court erred in its conclusions of law upon the facts found, and this is the only error that we need to examine.

It will be seen that no facts were found that in any way impugn the fairness and justness of the partition made, nor is the alleged fraud found. It is found that the appellee, Keyser, was not served with a summons in the partition suit, and that he had no actual notice thereof until the proceedings had terminated, but this does not exclude the inference that he may have been properly notified by publication. There is in the findings no cause established for the review. But it is argued by the appellees that Keyser was entitled to a review without showing cause. This argument is based upon the last section of the act on the subject of partitions (2 G. & H. 366, sec. 29), which reads as follows:

“Upon showing sufficient cause, any person not served with summons may, within one year after such partition is confirmed, appear and open the proceedings and obtain a review thereof, and, also, any person of unsound mind or any infant whose guardian did not attend and approve such partition, may, within one year after the removal of his disability, have a review of such partition.”

It is claimed that the words “upon showing sufficient cause,” as used in the statute, do not apply to persons of unsound mind and infants, and that an infant whose guardian did not attend and approve the partition may have a review, within the year, without showing any cause. We, however, are of a different opinion. In our opinion, taking into consideration the language of the statute, as well as the purpose evidently had in view by the legislature, that body did not intend to give an infant, where his guardian did not attend and approve the partition, the right of review within a year after coming of age, without cause, but only for cause. If infants, whose guardians do not attend and approve parti-

Vawter v. Franklin College.

tions, may, within the year after coming of age, without cause, have a review of proceedings in partition, and go over the ground again, and have new partitions made, it would seem that little good could result from making partitions of lands belonging to infants in whole or in part, unless their guardians attend and approve the partitions.

We are of opinion that the court erred in its conclusions of law upon the facts found, and that, on the facts found, the defendants in this action were entitled to judgment.

A preliminary question has been made by the appellee that should be noticed before closing this opinion. It is claimed that the judgment was not a final one from which an appeal lies to this court. But we are of opinion that the judgment was final, and that the appeal lies. A judgment for or against a review of a former judgment puts an end to the action for a review. If the judgment is against the review, the whole proceedings are at an end. If the judgment is for the review, as in this case, the action for review is ended, and no further proceedings are to be had in that action. Any further proceedings contemplated are to be had in the original action, and not in the action for review.

The judgment below is reversed, with costs; and the cause is remanded for further proceedings, in accordance with this opinion.

VAWTER v. FRANKLIN COLLEGE.

CORPORATION.—*Voluntary Association.*—*Articles of Association.*—*Amendment of Articles.*—*Corporate Seal.*—The articles of association of a voluntary association organized under the act of February 20th, 1867, 3 Ind. Stat. 550, to which subscriptions of capital stock were made, did not contain an impression or description of the corporate seal, but provided for amendments according to section 3 of said act, and the articles as recorded for the purpose of organizing the corporation stated, "The corporate seal

Vawter v. Franklin College.

shall be a circle formed by the letters of" the name of the association and the name of the State.

Held, in an action by the corporation upon a subscription of capital stock, to recover an assessment made thereon by the board of directors, that this was a sufficient compliance with the requirement of the statute that the articles of association shall contain an impression and description of the corporate seal.

SAME.—*Name and Residence of Stockholder.*—The subscription of stock sued upon in said action was made to the articles of association by writing the name of the subscriber, his residence and his number of shares in order under the words "Names, Residence, Shares."

Held, that the defendant could not claim that the articles of association did not show the name and place of residence of each stockholder.

SAME.—*Filing of Articles in Recorder's Office.*—*Pleading.*—The complaint in said action alleged that the association "caused said articles to be put on record in the recorder's office," etc.

Held, that this showed a sufficient filing under the statute.

PRACTICE.—*Striking Out Pleading.*—There is no error in striking out a paragraph of answer, when all the evidence admissible thereunder may be given under a remaining paragraph.

CORPORATION.—*Records.*—*Evidence.*—The records of a corporation are competent evidence on its own behalf to prove its organization and existence; and the introduction in evidence by the corporation of the record of a meeting of its stockholders could not be objected to on the ground that the minutes of such meeting were made on loose sheets of paper, and kept in a drawer several months, before they were copied into a book called the "record," it not appearing that such minutes did not truly represent the action of said meeting, or that the "record" was not adopted by the stockholders, or that there was anything improper in the transaction.

SAME.—*Notice to Stockholder of Assessment.*—A notice to a stockholder in a voluntary association of the amount due on an assessment upon his capital stock, the contract subscribed by him specifying no place of payment, need not designate the place of payment.

From the Johnson Circuit Court.

S. P. Oyler and D. Howe, for appellant.

G. M. Overstreet, A. B. Hunter, T. W. Woollen and C. Byfield, for appellee.

BIDDLE, J.—Certain persons, of whom the appellant was one, formed themselves into a voluntary association, by written articles, for the purpose of organizing a corporation by the name of "Franklin College," the object of which was to

Vawter v. Franklin College.

establish, maintain and operate an institution of learning at Franklin, Johnson county, Indiana. To this association the appellant, amongst others, subscribed five shares of stock of one hundred dollars each. Afterwards, as the complaint alleges, "a majority of the shares of said capital stock met and elected officers and a board of directors, as provided in said articles, and caused said articles to be put on record in the recorder's office in the said county of Johnson;" that the board of directors met and made an assessment of twenty per cent. on the capital stock so subscribed, including the stock subscribed by the appellant, and ordered the collection of the same, and in July, 1872, notified said defendant that said assessment had been made, and that the same would be payable at the expiration of sixty days thereafter, at the office of the secretary, in the city of Franklin; that the sum of one hundred dollars, with interest, was due on the appellant's subscription, which remained unpaid. Wherefore, etc.

The corporation was organized under the act approved February 20th, 1867, 3 Ind. Stat. 550, the second section of which reads as follows:

"That any number of persons may voluntarily associate themselves by written articles, to be signed by each person who may be a member at the time of organization, specifying the objects of the same, the corporate name they may adopt to designate such objects pursuant to this act, the names and places of residence of each member or stockholder, with an impression and description of the corporate seal, and in what manner persons shall be appointed or elected to manage the business and prudential concerns of any such association that may have been or shall hereafter be formed for either of the following purposes."

Then follow six clauses of the section, specifying the purposes for which any such corporation may be organized.

The appellant answered to the complaint:

1. No such corporation.
2. General denial.

3 and 4. Special denials.

The first, third and fourth paragraphs of answer were rejected on motion. Trial by the court, finding and judgment over the usual motions and exceptions, and appeal to this court.

The appellant objects to the complaint:

1. That the articles of association do not contain a description or impression of the seal. This is true, but the articles as recorded for the purpose of organizing the corporation describe the seal as follows: "And the corporate seal thereof shall be a circle formed by the letters of Franklin College, Indiana."

We think this is sufficient. The articles of association provide for amendments, according to section 3 of the act cited. This amendment was properly made.

2. That the name and residence of each stockholder do not appear. The form of the appellant's subscription is as follows:

Names.	Residence.	Shares.
"David G. Vawter,	Franklin, Ind.	5."

This is sufficient.

3. That it does not appear that the articles of association were *filed* in the recorder's office. The language of the averment is, "And caused said articles" (of association) "to be put on record in the recorder's office in said county of Johnson." This, we think, shows a sufficient filing under the statute.

4. That the appellant had no notice of the time and place of payment sixty days before the commencement of the suit. It appears to us the appellant in this is mistaken. The complaint avers that he was notified in July, 1872; the action was commenced in February, 1873. The complaint is sufficient.

The appellant complains that the court rejected paragraphs 1, 3 and 4 of his answer. There was no error in this ruling. Paragraph 2 put in issue every fact alleged in the complaint, and would admit under it all the evidence that could be legitimately given under paragraphs 1, 3 and 4.

Vawter v. Franklin College.

The appellant makes the following points under his motion for a new trial:

1. That the court erred in permitting the plaintiff to introduce in evidence, upon the trial, the record of the stockholders' meeting, because the minutes were made on "loose sheets of paper," and kept in a drawer about six months after the meeting, before they were copied in a book called the "record." It nowhere appears that the minutes so taken did not truly represent the action of the board, or that the "record" was not adopted by the board, or that there was anything improper in the transaction. The records of a corporation are competent evidence, on its own behalf, to prove its organization and existence.

2. This point is the same as the first, except that the evidence was applicable to another meeting of the directors, and the same rule must be held with regard to it.

3. That the notice to the defendant of the amount due on the assessment against him does not specify the *place* of payment. No notice of place is necessary in such cases. *Ross v. The Lafayette, etc., R. R. Co.*, 6 Ind. 297. The contract subscribed by the appellant specifies no place of payment of his subscription. The place of payment was fixed simply for the convenience of the corporation.

4. That the court erred in permitting evidence to go to the jury of the appellant's acts and declarations at a certain stockholders' meeting. We can perceive no error in this ruling. It was not necessary to the case. The obligation of the appellant arose out of his subscription, not out of what he said and did at a stockholders' meeting. The evidence was, at most, irrelevant. Besides, the appellant cannot complain of his own acts and declarations.

5. That the finding is not sustained by the evidence. We think it is.

The following cases may be consulted as to the principles governing this case: *Ross v. The Lafayette, etc., R. R. Co.*, 6 Ind. 297; *Eakright v. The Logansport, etc., R. R. Co.*, 13 Ind. 404; *Heaston v. The Cincinnati, etc., R. R. Co.*, 16 Ind.

Tucker v. Taylor.

275; *Wert v. The Crawfordsville, etc., Turnpike Co.*, 19 Ind. 242; *Franklin College v. Hurlburt*, 28 Ind. 344; *The Northwestern Conference, etc., v. Myers*, 36 Ind. 375; *The Indianapolis Furnace, etc., Co. v. Herkimer*, 46 Ind. 142; *Nelson v. Blakey*, 47 Ind. 38; *Ransom v. Priam Lodge, etc.*, 51 Ind. 60; *Instone v. The Frankfort Bridge Co.*, 2 Bibb, 576; *The Chester Glass Co. v. Dewey*, 16 Mass. 94; *Tar River Nav. Co. v. Neal*, 3 Hawks, 520; *Rathbone v. Tioga Nav. Co.*, 2 Watts & S. 74; *Elizabeth City Academy v. Lindsey*, 6 Ire. 476. See, also, *Angell & Ames Corp.*, secs. 523-526.

The judgment is affirmed, with costs and ten per cent. damages.

WHITESIDES v. FRANKLIN COLLEGE.

From the Johnson Circuit Court.

S. P. Oyler and *D. Howe*, for appellant.

G. M. Overstreet, *A. B. Hunter* and *T. W. Woollen*, for appellee.

BIDDLE, J.—This case is, in all respects, similar to the case of *Vawter v. The Franklin College*, decided at the present term, *ante*, p. 88.

The judgment is therefore affirmed, with costs and ten per cent. damages.

TUCKER v. TAYLOR.

BAILMENT.—*Mechanic's Lien on Chattel*.—The lien of a mechanic upon a chattel for labor performed thereon by him is destroyed by his voluntary relinquishment of the possession of the chattel to the bailor.

SAME.—*Agreement for Future Payment*.—Such lien cannot exist where, by the terms of the contract of bailment, a future day of payment for such labor has been agreed upon.

Tucker v. Taylor.

SAME. — A mechanic, having repaired a wagon for another person, the owner thereof, for which labor payment was to be made in the use by the mechanic of the wagon and a horse to be furnished by said owner, to make a certain journey, permitted said owner to take possession of the wagon, and, after a time, received it again to use on said journey; but, said owner having failed to furnish a suitable horse, the mechanic asserted a lien upon the wagon for his said work thereon, advertised it for sale, and became the purchaser at such sale.

Held, that said owner was entitled to recover the possession of the wagon from said purchaser.

From the Hamilton Circuit Court.

J. W. Evans and *R. R. Stephenson*, for appellant.

W. Garver and *J. S. Losey*, for appellee.

DOWNEY, C. J.—This was an action by the appellant against the appellee, as in replevin, for the recovery of a spring wagon. The defendant answered in three paragraphs:

1. A general denial.
2. Property in the defendant.
3. Special property in the defendant as bailee of the wagon, claiming a lien thereon as a mechanic for work done thereon.

Reply in two paragraphs, to the second and third paragraphs of the answer. Trial by jury, verdict for the defendant, motion by the plaintiff for a new trial overruled, and final judgment for the defendant.

The error assigned is the overruling of the motion for a new trial.

The facts, in substance, are, that the appellant owned the spring wagon and one or more horses. The appellee, being a mechanic, agreed to make certain repairs on the wagon, in consideration of which he was to have the use of the wagon and a horse of the appellant to make a trip to Ohio. He made the repairs on the wagon, and allowed the appellant to take it away, not then being ready to make the trip to Ohio. After some three weeks he got ready to go to Ohio, and then the appellant had sold the horse which appellee expected to use. The appellant furnished him another

Blessing v. Dodds.

horse, which kicked the dash-board off the wagon and broke the shafts. The appellant got, and offered the appellee, another horse, which he refused to use, on the ground that he did not consider him strong enough. The appellee then asserted a lien upon the wagon, advertised it for sale, and became the purchaser thereof himself. The appellant then brought this action for the recovery of the possession of the wagon.

The insufficiency of the evidence was one of the reasons alleged for a new trial. In our opinion, the new trial should have been granted. The evidence is consistent that the appellee parted with the possession of the wagon, relying on the promise of the appellant to furnish it to him when he got ready to make the trip to Ohio. Possession is essential to the existence of such a lien. If the mechanic part with the possession, the lien is gone. He retains the right to sue for a compensation for the work done, but he cannot assert the lien. *Jacobs v. Latour*, 5 Bing. 130; *Chase v. Westmore*, 5 M. & S. 180; *Morse v. Androscoggin R. R. Co.*, 39 Maine, 285; *King v. The Indian Orchard Canal Co.*, 11 Cush. 231. In addition to this, it is the law that no lien exists, if, by the bargain, a future day of payment be agreed upon; for, in such case, the detention of the chattel would be inconsistent with the terms of the contract. 2 Chit. on Con. 802, 11th Am. ed. Such seems to have been the understanding of the parties in this case.

The judgment is reversed, with costs, and the cause is remanded for a new trial.

BLESSING v. DODDS.

EVIDENCE.—*Declarations of Party.*—*Attorney.*—*Agent.*—On the trial of an action by A. against B. to recover one-half of the costs and expenses incurred in a suit theretofore prosecuted in their joint names and paid by A., the question in controversy being whether B. was a real party in

Blessing v. Dodds.

interest in said joint action, and therefore liable for one-half the costs and expenses thereof, or whether he had no interest therein, and it was commenced without his knowledge or consent, and he afterwards agreed that it might be prosecuted in his name, with that of A., for the sole benefit of A., and without responsibility on his part, as between him and A., for said costs and expenses, it was competent for B. to give in evidence a conversation between himself and an attorney of A. in said joint action, had in the absence of A., after B. had learned of the pendency of said joint action, in which conversation such an agreement for the continued prosecution of said joint action was made, and also a conversation, had also in the absence of A., between B. and another attorney of A. in said joint action, who had been instructed by A. to procure the signature of B. to an appeal bond for the purpose of appealing said joint action to the Supreme Court, for the purpose of showing that B. signed said appeal bond upon a similar condition and agreement.

From the Shelby Circuit Court.

S. Major, C. Wright and T. W. Woollen, for appellant.

O. J. Glessner, K. M. Hord and A. Blair, for appellee.

BUSKIRK, J.—This was a suit by Blessing to recover from Dodds one-half of the costs and expenses incurred in the prosecution of a suit in their joint names, in the Decatur Circuit Court, against one Alonzo Blair, in which action there had been a verdict and judgment in favor of Blessing and Dodds for a nominal sum. Blessing, having paid all the costs and expenses, amounting to the sum of ——— dollars, brought this action to recover from Dodds the one-half of such sum.

The appellee answered by the general denial. There was a trial by jury, resulting in a verdict for the appellee.

The only error assigned is based upon the action of the court below in overruling the motion for a new trial.

The only question discussed and relied upon by counsel for appellant for a reversal of the judgment is the alleged admission of illegal and incompetent evidence. The appellee was examined as a witness, and, over the objection and exception of the appellant, was permitted by the court to testify as follows:

“I went to Edwin W. Davis, Blessing’s attorney, and told him my feelings; that my name had been used without

Blessing v. Dodds.

my knowledge or consent; told Davis it was not right for Blessing to use my name without authority."

Again. "I spoke to Ben Love about the matter; told him that my name was used without my consent; that I would employ counsel to have my name taken off. My actions were governed by assurances I received from Davis and Love, with the assurances from Davis and Love that I was to be put upon the stand as the last witness for the plaintiff, and the question to be asked me what interest I had in the result of the suit tried at Greensburg. My answer was to be, that I had no interest in the suit; that I was not a party. I was not put on the witness stand; was angry because I had been treated in the manner I was; that if I had been put upon the stand, I could have explained the matter."

Again. "I was going to Illinois, and, while at the depot, met Martin M. Ray; Ray said Blessing had requested him to get me to sign the appeal bond; I told Mr. Ray I would not do it; that they had deceived me; they had not put me on the stand, as per agreement, as a witness. Mr. Ray said he was fully aware that I was not a party to the suit. I told him that he knew the facts as to their using of my name without my knowledge or consent. He said he was fully aware that I was not a party to the suit, and it was so understood by all the attorneys at the trial, and also by Mr. Blessing, that I was not a party to the suit."

Again. "Claiming, from the fact (and it was so understood) that my name had been used without my knowledge or consent, that it was necessary to use my name, as I had been a party to the suit originally, he gave me the assurance that if I would sign the bond, I should be held harmless. I asked him to just write up, setting forth this fact, that I will be held harmless in the result, whatever it might be in this suit, then I would sign the bond, and we would sign the agreement. He said it was not necessary to do that, but

Blessing v. Dodds.

gave the assurance that if I should sign the bond, Mr. Blessing could not harm me.”

It is essential to the full comprehension of the question at issue, and the materiality of the evidence objected to, that we should make a statement of the facts and circumstances connected with the action against Blair.

In October, 1867, the appellant and appellee were partners in the manufacture of whiskey, in Shelby county, in this State, and were the owners of a small tract of land, upon which the distillery was situate. During such joint ownership, it was claimed that Blair had obstructed a water-course that flowed by the distillery and was essential to the successful operation thereof. Blessing and Dodds commenced, in the Shelby Circuit Court, an action against Blair to recover damages for such obstruction. The venue was changed, and the cause was sent to the Dearborn Circuit Court. While such cause was pending, the distillery and the premises connected therewith, were, by the agreement of the owners, sold at auction, and were purchased by Blessing. The partnership was dissolved, and a final settlement was made, and the action pending in the Dearborn Circuit Court was dismissed. Dodds went to the State of Illinois on business, and was absent some months. During his absence, Blessing formed a partnership with one Sayler, for the purpose of conducting such distillery. During the absence of Dodds, Blessing, by his attorneys, Ray, Davis and Love, commenced another action, in the name of himself and Dodds, against said Blair for said obstruction of said water-course. The venue was changed to the Decatur Circuit Court. When Dodds returned to Shelbyville, he heard of the institution and pendency of such action. The appellant instituted and prosecuted the present action upon the theory that the action against Blair had been prosecuted with the knowledge and consent of Dodds, and, to sustain such theory, he introduced in evidence the complaint against Blair, and the appeal bond in the appeal to the Supreme Court, which was signed by Blessing and Dodds as principals and others as

Blessing v. Dodds.

sureties, and proved that Dodds was present at the trial at Greensburg, and consulted with the attorneys prosecuting the action, and conversed with the witnesses; and the appellant testified to various conversations with the appellee about said action. The defence was, that the action was commenced during the absence of Dodds from the State, and without his knowledge; that, when he heard of the pendency of the action, he protested against the use of his name, and threatened to employ counsel to dismiss the action as to himself; that, thereupon, it was agreed between Dodds and Davis and Love, attorneys for Blessing, that the action should be prosecuted in the joint names of Blessing and Dodds, upon the conditions that Dodds was to receive no benefit and was to incur no responsibility, and that he was to be examined as a witness, when he was to testify that he had no interest in the action, it being prosecuted in their joint names, but for the sole benefit of Blessing; that such agreement had been violated by not calling him as a witness; that he had signed the appeal bond upon the agreement with Mr. Ray that he would be fully indemnified by Blessing, and would incur no liability as a principal in such bond.

It is obvious that the real controversy on the trial was, whether Dodds was a real party in interest with Blessing, and therefore liable for his share of the costs and expenses of the action, or whether the action had been commenced without his knowledge or consent, and he had afterwards consented that the action might be prosecuted in his name, for the sole benefit of Blessing, and without responsibility on his part, as between Blessing and himself, for the costs, attorneys' fees, and other expenses incident to the action.

It is contended by counsel for appellant, that the evidence hereinbefore set out was illegal and incompetent, for the reasons that appellant was not present at such conversations; that a party cannot prove his own declarations, or give them in evidence, to sustain himself in the prosecution or defence of a cause; that the representations, promises and assurances,

Blessing v. Dodds.

said to have been given to the appellee by Davis, Love and Ray of and concerning the trial of the action against Blair, had properly nothing to do with the case at bar; that they were not made or given in the presence of appellant, nor authorized by him, and that he was not bound thereby; in other words, that the declarations of the appellee did not constitute a part of the *res gestæ*, and were, therefore, mere hearsay; and that if they would have constituted a part of the *res gestæ* if they had been made to the appellant, the promises and assurances of his attorneys were not binding on him, because they were in no proper sense his agents, and could not bind him.

There is no question that it was competent for the appellee to detail the conversation which he had with Mr. Ray, in reference to the execution of the appeal bond, and the terms and conditions on which he had signed the same. The appellant testifies that he requested Mr. Ray to see the appellee and procure his signature to the appeal bond. Mr. Ray occupied a double relation to the appellant; he was not only his attorney in conducting his lawsuit, but he was his special agent. The conversation between the appellee and Mr. Ray had the same force and effect as though it had taken place between the appellant and the appellee.

The conversation between the appellee and Messrs. Davis and Love stands upon somewhat different ground. It does not appear from the evidence that the appellant had specially authorized either Mr. Davis or Mr. Love to hold any communication with the appellee, or that he had ratified the agreement which had been made in reference to the continued use of the appellee's name as one of the plaintiffs in said cause. Messrs. Davis and Love were confessedly the attorneys of the appellant, and, as such, had instituted said suit in the joint names of the appellant and appellee. Had the appellee remained absent from the State, and ignorant of the use which had been made of his name, he would not have been bound thereby; but when he returned and ascertained that his name had been used as a plaintiff, it became his

Blessing v. Dodds.

duty to disavow the act of those who had assumed to represent him, for silence, under such circumstances, would have created a strong presumption that his name had either been used with his knowledge and consent, or that he had acquiesced in such use. The appellee was compelled either to disavow or approve the acts of those who had assumed to act for him. *Pierce v. Goldsberry*, 35 Ind. 317. No one would doubt the competency of the evidence, if the conversation had occurred and the agreement had been made between the parties. *Ball v. Clark*, 15 Ind. 370. It would neither have been hearsay evidence nor *ex parte* declarations. Davis and Love were entrusted with the management of the action for and on behalf of Blessing, and, acting in that capacity, they had assumed to represent Dodds. He unquestionably had the right to repudiate their agency and action. His disavowal of their authority and action was proper and admissible. But his evidence goes further. He testified that he consented to the continued use of his name upon the terms and conditions named, and the question arises whether they had the authority to bind their client by their agreement with appellee.

After thoughtful consideration, we have arrived at the conclusion that notice to them was notice to their client, and that the use of his name afterwards was upon the terms and conditions stated, and, as they were not complied with, his name was used without his authority.

The learned counsel for appellant have cited many cases to show that a party cannot make evidence himself by proving his own declarations, which do not constitute a part of the *res gestæ*. The cases cited were where declarations were made by a party to his own agent, or to third persons, and such declarations were properly excluded. Here the facts are different, and the rule of law should be different.

We think the court committed no error in the admission of the evidence complained of.

The judgment is affirmed, with costs.

Emily v. Harding.

58	102
141	313

EMILY v. HARDING.

PLEADING. — *Action to Recover Possession of Real Property.* — *Answer.* — *Cross Complaint.* — Where, to a complaint for the recovery of the possession of real estate, there is an answer of general denial, there can be no error in striking out or sustaining a demurrer to another paragraph of answer alleging only matter of defence, every defence, whether legal or equitable, being admissible in evidence under such denial; but the specific performance of a parol contract for the sale and conveyance of said real estate, made between the plaintiff's grantor, he being the owner thereof, and the defendant, and partly performed by said grantor's putting the defendant in possession of the real estate, the making of valuable and lasting improvements thereon by the defendant, and his performance of the consideration, the plaintiff, with knowledge of said contract, having afterwards received his deed of conveyance of said real estate from said grantor, cannot be obtained, and the defendant's title cannot be quieted, under such answer of denial; but such affirmative relief may be granted under a special answer and cross complaint alleging such facts, and proof thereof.

From the Harrison Circuit Court.

B. P. Douglass and *S. M. Stockslager*, for appellant.

W. A. Porter, for appellee.

DOWNEY, C. J. — This was an action by the appellee against the appellant and another, who declines to join in the appeal, to recover the possession of real estate.

The defendant Mahala Emily pleaded, as a third paragraph of answer and cross complaint, the following facts: that heretofore one Elizabeth Fleshman was the owner in fee simple and in possession of the real estate, and by a parol contract sold the same to the defendant Mahala Emily, and, in pursuance of said sale, and as a part performance thereof, put the defendant in possession thereof, and agreed to convey the title to her; that the consideration for said real estate was work and labor and valuable services, rendered by defendant to said Elizabeth, at her special instance and request; that defendant has fully paid the purchase-price for said land to said Elizabeth, by fully performing the services and work and labor, as agreed to be performed; that, relying upon said contract, she, with the full knowledge of said

Emily v. Harding.

Elizabeth, and without objection from her, made valuable and lasting improvements on said real estate, by the building of a dwelling-house, stable and other out-buildings thereon, the clearing and fencing of a large portion thereof, and the planting, cultivating and raising of six hundred valuable fruit trees, with small fruit, etc., of the aggregate value of seven hundred and fifty dollars; that the defendant has fully performed her part of said contract; and that said Elizabeth has failed to convey the legal title to said real estate to this defendant; but, on the contrary, in February, 1873, she pretended to convey the same, by legal title, to said plaintiff, who, having full knowledge of said contract aforementioned, received said pretended deed of conveyance. Wherefore, by reason of the matters alleged, the defendant prays the court to decree the specific performance of said contract, and that the defendant's title be quieted.

A demurrer was filed by the plaintiff to this paragraph of the answer and cross complaint, and sustained by the court.

The first paragraph of the answer was a general denial. The second and fourth set up, specially, matters of defence. A motion to strike out the second and a demurrer to the fourth were sustained.

Error is assigned on these rulings of the court, and on the refusal to grant a new trial.

We think the court committed no error in striking out the second, and sustaining the demurrer to the fourth, paragraph of the answer. The matters pleaded in these paragraphs were admissible under the general denial. 2 G. & H. 283, sec. 596. But, in sustaining the demurrer to the third paragraph, we think the court committed an error. The affirmative relief sought in that paragraph could not have been granted under the issue formed by the general denial. We think the paragraph sufficient.

For this error we must reverse the judgment, and need not examine the alleged error in refusing to grant a new trial.

The judgment is reversed, with costs, and the cause

Weathers et al. v. Doerr et al.

remanded, with instructions to overrule the demurrer to the third paragraph of the answer and cross complaint, and for further proceedings.

WEATHERS ET AL. v. DOERR ET AL.

PLEADING.—*Review of Judgment.*—In an action to review a judgment for error of law appearing in the proceedings and judgment, the complaint should set out a complete record of such judgment, and the error must appear on the face of the record, the truth of which cannot be contradicted by such complaint.

BILL OF EXCEPTIONS — *Striking Out Pleading.* — A pleading or a part of a pleading struck out by the court cannot be presented to the Supreme Court without a bill of exceptions setting it out.

From the Jackson Circuit Court.

D. H. Long, B. E. Long and F. T. Hord, for appellants.
W. K. Marshall, for appellees.

PETTIT, J. — This suit was brought by the appellants against the appellees, to review a judgment. Sec. 587 of the code provides, that “the complaint may be filed for any error of law appearing in the proceedings and judgment, or for material new matter, discovered since the rendition thereof, or for both causes, without leave of court.” 2 G. & H. 280.

There is no attempt to put this case on the discovery of new matter since the rendition of the judgment. A full transcript of the judgment was not filed with, and made a part of, the complaint for review. The complaint does not point out any error appearing on the face of the record, but attempts to contradict its truth. This can not be done in a case for review. The error must be apparent on the face of the record. Buskirk’s Prac. 270.

All the principal allegations of the complaint were struck out, on motion, leaving nothing but the reciting or historical

Shepard *et al.* v. Birth.

parts. To the residue of the complaint a demurrer for want of sufficient facts was sustained.

The striking out certain parts of the complaint is assigned for error, but the parts struck out are not presented to us by a bill of exceptions setting out the parts struck out. A pleading struck out forms no part of the record, unless copied into a bill of exceptions. On this point the authorities are numerous in our reports.

The demurrer to the residue of the complaint was properly sustained, because it showed no error apparent on the face of the record.

The judgment is affirmed, at the costs of the appellants.

SHEPARD ET AL. v. BIRTH.

BILL OF EXCEPTIONS.—*Amendment of Complaint After the Sustaining of Demurrer for Want of Jurisdiction.*—The ruling of a court in granting leave to amend a complaint, after a demurrer thereto assigning want of jurisdiction of the court over the subject of the action has been sustained, can be reserved for the consideration of the Supreme Court only by a bill of exceptions setting out the original complaint and showing the ground of objection to the amendment and the action of the court thereon.

DEMURRER.—*Harmless Error.*—Where demurrers to paragraphs of answer have been sustained, and there is afterwards filed an additional paragraph of answer, under which all evidence may be admitted on the trial that would have been admissible under those to which demurrers have been sustained, errors in such rulings on the demurrers cannot be available on appeal.

From the Knox Circuit Court.

W. E. Niblack, W. H. De Wolf and C. M. Allen, for appellants.

J. Baker, for appellee.

DOWNEY, C. J.—The appellee sued the appellants. A demurrer to the complaint was filed by the defendants, on

Shepard et al. v. Birth.

the ground of want of jurisdiction of the court over the subject of the action. This demurrer was sustained by the court, and the complaint was then, by leave of the court, amended, so as to count upon a trespass to personal property. In its amended form, it charges that the defendants, without authority of law, took and carried away, and converted to their own use, divers articles of personal property of the plaintiff, stating the names of the several articles, and the value thereof.

The defendants answered in five paragraphs. The first was a general denial; the second was an answer of leave and license; the third, fourth and fifth, justified the seizure of the goods, on the ground that the defendant Shepard was collector of internal revenue of the United States, and Bayse, the other defendant, his deputy; and that the goods were seized to make a tax due from the plaintiff, as a distiller of liquors, etc. To the third, fourth and fifth paragraphs demurrers were filed by the plaintiff, and sustained by the court.

The defendants then filed a sixth paragraph of answer, which, as we understand counsel to admit, covered the ground occupied by the third, fourth and fifth paragraphs, to which demurrers were sustained.

There was a reply, in denial of the second and sixth paragraphs of the answer.

The issues were tried by a jury, and there was a verdict for the plaintiff for one thousand dollars. A motion by the defendants for a new trial was overruled, and there was final judgment on the verdict.

Errors are assigned as follows:

1. Granting leave to amend the original complaint, after a demurrer had been sustained for want of jurisdiction.

2. Sustaining the demurrers to the third, fourth and fifth paragraphs of the answer of the defendants.

3. Refusing to grant a new trial, on the motion of the defendants.

We think the first alleged error cannot be considered.

Shepard *et al.* v. Birth.

When the demurrer to the original complaint was sustained, and an amended complaint filed, the original was no longer in the record, to be certified here, unless made so by bill of exceptions, or order of court, for some proper purpose. 2 G. & H. 273, sec. 559; *McEwen v. Hussey*, 23 Ind. 395; *Toledo, etc., Co. v. Rogers*, 48 Ind. 427. Other cases might be cited.

No bill of exceptions was filed, or order of court made, by which the original complaint can be regarded as part of the record.

We think the point which counsel discuss could only be presented by bill of exceptions, setting out the original complaint, and thus showing what the cause of action stated therein was, and also stating the ground of objection to the amendment and the action of the court thereon.

The question relating to the demurrers to the third, fourth and fifth paragraphs of the answer may be disposed of on the ground already intimated; that is, that the sixth paragraph covers all the ground occupied by these paragraphs of the answer, and warranted the introduction of all the evidence which could have been given under them or any of them. The sustaining of the demurrers to these paragraphs of the answer did not, therefore, do the defendants any material harm. This has been often decided. No complaint is made that any material evidence was excluded.

The following are the reasons assigned in the motion for a new trial:

1. That the verdict of the jury herein is contrary to law.
2. That the verdict of the jury is contrary to the evidence.
3. That the verdict of the jury herein is contrary to the law and the evidence.
4. That the damages found by the jury herein are excessive.
5. For error in the assessment of damages herein, the same being too large.

The evidence tends to show that the appellee was chargeable with over four thousand dollars of taxes, the correct-

Montgomery *et al.* v. The State, *ex rel.* Southard.

ness of which he does not appear to have seriously controverted. The taxes appear to have been regularly assessed, a warrant or precept for their collection issued, and the sale of the property duly advertised and made. Counsel for appellants claim that the officers making the seizure and sale of the property were justified by the facts disclosed in what was done by them. They cite *Erskine v. Hohnbach*, 14 Wal. 613, and *Haffin v. Mason*, 15 Wal. 671. We should not doubt that the officers were justified in their acts, while they kept within the sphere of legal authority and duty. But there is evidence, as we understand the testimony, that they did not do this. The evidence tends to show that property was taken besides that officially seized, which was damaged, wasted or consumed, to an amount equal to or greater than the amount of the verdict.

A question is made as to the right of the plaintiff to give evidence of the taking of property, other than that officially seized by the officer, without a special reply to the answer, by way of new assignment. In our judgment, there was no error here. The evidence went to the jury without any objection, and the question was in no way reserved in the court below; nor is it presented here so that it can be decided. The case is before us on the evidence, and we do not see that we ought to disturb the judgment.

The judgment is affirmed, with costs

MONTGOMERY ET AL. v. THE STATE, EX REL. SOUTHARD.

PLEADING. — *Statute Containing Exception or Condition.*—*Suit on Constable's Bond.*—A complaint on the official bond of a constable, under section 9 of the act in relation to constables, 2 G. & H. 617, for his failure to do his duty in making a levy of an execution as required by the sixth clause of section 3 of said act, which does not allege that property could be found

53	108
161	687
162	253

Montgomery *et al.* v. The State, *ex rel.* Southard.

by the constable on which to make a levy, or that the constable was not directed by the plaintiff or his agent not to make a levy, is insufficient.

From the White Circuit Court.

J. H. Wallace and *D. V. Burns*, for appellants.

Reynolds & Green, for appellee.

PETTIT, J. — This was a suit by the appellee against the appellants, being a constable and his sureties, for failing to do his duty in making a levy of an execution as required by the sixth division of section 3, 2 G. & H. 620-1, which reads thus:

“Sixth. To levy every execution, and make at least one offer to sell property levied upon within one month after such execution comes to his hands, if property can be found, unless otherwise directed by the plaintiff, or his agent.”

The ninth section of the same act gives the right of action and fixes the damages and penalty for the non-performance of the duty above prescribed.

The question of the sufficiency of the complaint is properly presented.

The complaint does not allege or charge that property could be found by the constable, on which to make a levy, or that the constable was not directed by the plaintiff, or his agent, not to make a levy.

Where there is an exception or condition in a law imposing a duty or giving a right of action, the exception or condition must be negatived, in order to make a pleading good on such a law.

This ruling is fully sustained by the following authorities: *Weaver v. The State, ex rel. Thompson*, 8 Blackf. 563; *Struble v. Nodwift*, 11 Ind. 64; Gould Plead., ch. 4, sec. 22, p. 166; *The State, ex rel., etc., v. Shackelford*, 15 Ind. 376; *Ezra v. Manlove*, 7 Blackf. 389.

The judgment is reversed, at the costs of the relator, with instructions to allow the plaintiff to amend the complaint, if asked for.

Mitchell v. Dickson *et al.*

MITCHELL v. DICKSON ET AL.

PARTIES.—*Decedents' Estates.—Administration.*—The widow of a deceased payee of a promissory note, the other heirs having assigned said note by indorsement to her, there being no debts of the decedent to be paid, and the estate having been settled without administration, may maintain an action in her own name on said note.

From the Lawrence Circuit Court.

F. Wilson and *M. F. Dunn*, for appellant.

G. Putnam, *G. W. Friedley* and *H. C. Duncan*, for appellees.

DOWNEY, C. J. — The appellees executed a promissory note to Alonzo Wilcox, who afterwards died, leaving surviving him the appellant, his widow, and three married daughters. The daughters and their husbands assigned the note, by indorsement, to the appellant. There were no debts of the deceased to be paid, and the estate was settled without administration.

The only question in the case is, whether the appellant could, under the circumstances, maintain an action on the note. The circuit court held that she could not. Counsel for appellees cite *Walpole's Adm'r v. Bishop*, 31 Ind. 156, and insist that the action could only be sustained by an administrator of the payee of the note.

Counsel for appellant cite and rely upon *Martin v. Reed*, 30 Ind. 218.

The question turns upon the fact whether there are or are not debts to be paid. As there were no debts to be paid in this case, we hold that the appellant could recover. See, also, *Bearss v. Montgomery*, 46 Ind. 544.

The judgment is reversed, with costs, and the cause is remanded.

53	110
125	204
53	110
125	204
53	110
125	204

Hancock v. Heaton.

HANCOCK v. HEATON.

GUARDIAN AND WARD. — *Judgment.* — *Practice.* — The complaint in an action by a minor against his guardian did not ask any relief, except that the court “discharge and remove the defendant from his said trust as such guardian,” and did not allege that the guardian had any specific sum of money in his hands for which he ought to account; and the court found merely that the defendant was the guardian of the plaintiff, a minor, and that it would be to the interest of said ward to have said guardian removed.

Held, that the court could not order the guardian to immediately make report and pay into court the assets in his hands belonging to said ward.

Held, also, that, to reserve such an error in the judgment for the consideration of the Supreme Court, a motion for a new trial was not necessary.

From the Tipton Circuit Court.

J. W. Robinson, for appellant.

W. Garver and *J. S. Losey*, for appellee.

DOWNEY, C. J. — This was a proceeding by the appellee, by his next friend, against the appellant, his guardian, to remove him from the trust. On the final hearing, the court removed the guardian, and ordered that he report immediately, and pay over to the court the assets in his hands belonging to his ward. To this order the defendant excepted.

It is alleged as error, that the court improperly ordered the guardian to make report and pay into court, immediately, the money in his hands. It is claimed by the appellant, that the court could only remove the guardian, and leave the ward to his remedy on the bond, but could not order the payment of the money into court.

The appellee insists, that the appeal should be dismissed, because the record does not show that a motion was made by the appellant for a new trial. But the alleged error was not committed on the trial, or even prior to it. It was committed, if at all, in rendering the judgment. The appeal cannot be dismissed for this reason.

We have concluded that the case may be disposed of without deciding the question whether there may or may not be

The State, *ex rel.* The Logansport National Bank, *v.* Kent *et al.*

cases in which such an order would be proper. In this case, the only relief asked in the complaint is, that the court "discharge and remove the defendant from his said trust as such guardian." It is not alleged that the guardian has any specific sum of money in his hands, for which he ought to account; nor did the court find any sum of money for which he should account. The only finding was, "that James R. Hancock is the guardian of Ebenezer Heaton, a minor, and that it will be to the interest of said ward to have said guardian removed."

Under these circumstances, we think we should hold the part of the judgment in question unauthorized and erroneous.

So much of the judgment as directs the guardian to report immediately and pay over to the court the assets in his hands belonging to his ward is reversed, with costs.

THE STATE, EX REL. THE LOGANSPORT NATIONAL
BANK, *v.* KENT ET AL.

53	112
154	604
53	112
163	412
163	413
163	418

OFFICIAL BOND.—*Liability of Surety.*—*County Auditor.*—A county auditor, as such, fraudulently issued an order, payable to himself, on the county treasurer, for a balance of fees falsely pretended therein to have been allowed him as auditor by the board of county commissioners, and presented it to said treasurer, who indorsed it, "Not paid for want of funds." And said auditor afterwards presented it to a bank, which, in good faith, relying on the genuineness of the order, and without notice of its fraudulent character, advanced money to the auditor upon the deposit of said order as security therefor, which money becoming due and being unpaid, the bank demanded of said treasurer payment of said order, which he refused.

Held, in an action, brought by said bank as relator, upon the official bond of said auditor, conditioned for the faithful and impartial discharge of the duties of his office according to law, that the act which resulted in

The State, *ex rel.* The Logansport National Bank, *v.* Kent *et al.*

damage to the relator, being the presentation to it of the order and the obtaining of said money thereby, was not an official act, and the sureties on said bond were not liable for said damage. WORDEN and PETTIT, JJ., dissented.

From the Newton Circuit Court.

D. P. Baldwin, for appellant.

C. H. Test, *D. V. Burns* and *H. Burns*, for appellees.

DOWNEY, C. J.—This was an action by the appellant against Alexander Ekey, Alexander J. Kent, Peter Kline, William Williams and John Ryan. The action was predicated on the official bond of Ekey, as auditor of Newton county. The condition of the bond is as follows, after the recitals:

“Now, if the said Alexander Ekey shall faithfully and impartially discharge the duties of his office according to law, then this obligation shall be void, else, to remain in full force.”

The complaint is in two paragraphs. The first states the election of Ekey in October, 1867, for four years, the execution of the bond on the 2d day of December following, by Ekey and his said sureties, and the acknowledgement and approval of the same; that Ekey took the oath, and assumed the duties of the office; that the relator is a corporation, etc. It is further stated, that Ekey did not faithfully discharge his duties as auditor of said county, as provided in said bond, but defaulted, in this, to wit: At the June term, 1871, of the board of commissioners of said county, the county owed Ekey nothing; but, on the contrary, he owed the county five hundred dollars, for an overdrawn account for fees and services theretofore pretended by him to have been rendered to and for the county; that, fraudulently concealing the overdrafts and indebtedness, on the 10th of June, 1871, he procured an allowance from the board, for services up to February 22d, 1871, of three hundred and fifty-five dollars and seventy-one cents, and the same was so entered on the order-book and signed by the commissioners; that

The State, *ex rel.* The Logansport National Bank, *v.* Kent *et al.*

Ekey did, then and there, fraudulently and wrongfully raise said allowance to nine hundred and fifty-five dollars and seventy-one cents, by erasing the figure three, and changing the same to a nine; that he drew an order, number forty-six, for two hundred dollars, in his own favor, June 15th, 1871, which, on June 17th, 1871, he presented to the treasurer, who indorsed it, "Not paid for want of funds;" that he drew order number forty-eight, for two hundred dollars, on the 12th day of June, 1871, which was paid on the 14th day of June, 1871; that on the 15th day of June, 1871, Ekey falsely and fraudulently, and in violation of his duty as auditor, as aforesaid, and contrary to the terms of his bond, drew, in his own favor, an order, as follows:

"No. 51.

\$800.

"AUDITOR'S OFFICE, KENTLAND, IND.,

"June 15th, 1871.

"Treasurer of Newton county, Ind.:

"Pay to Alexander Ekey, eight hundred dollars and ——— cents, for balance fees as auditor, from June 1st, 1870, to February 22d, 1871, as allowed by the board of commissioners of said county at their June term, 1871.

"ALEXANDER EKEY,

"Auditor of Newton County."

Which order he presented to the treasurer, who indorsed the same, "June 20th, 1871. Not paid for want of funds. A. A. Myers, T. N. Co."

It is further stated, that Ekey, then and there, fraudulently and falsely, and in violation of his duty and the terms of his bond, entered upon the register of orders, as order number fifty-one, dated June 15th, 1871, an order of four hundred dollars, in favor of H. K. Warren, for services as sheriff. All of which acts, it is stated, were done by Ekey under color and by virtue of his possession of said office and the books and papers thereof; that, being so in possession of said order, Ekey, June 20th, 1871, presented the same to relator, as a valid and subsisting obligation, and the relator, relying upon the same and the recitals thereof and

The State, *ex rel.* The Logansport National Bank, *v.* Kent *et al.*

signatures thereto, innocently and without notice of any of the foregoing frauds, upon said day, advanced to said Ekey, upon deposit of said order with her as security therefor, the full amount of said order, to wit, eight hundred dollars, which advance was made in good faith; that the said sum is past due and wholly unpaid; that relator has demanded of the treasurer of said county payment of the order, which he has refused, and there is now due to the relator twelve hundred dollars. By reason of which, a cause of action has accrued to relator on said bond, to the amount of said order and interest, etc. Wherefore, etc.

The second paragraph is like the first, except that it counts upon an order for four hundred dollars, issued under the same circumstances.

On the coming of the parties into court, the death of Ryan was suggested, the case as to Ekey and Williams was continued, and Kent and Kline demurred, separately, to each paragraph of the complaint, on the ground that they did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court, and there was judgment for the defendants.

The errors assigned are:

1. Sustaining the demurrer to the first paragraph of the complaint.
2. Sustaining the demurrer to the second paragraph of the complaint.
3. Rendering judgment against the relator for costs.

The only question is, whether the acts of Ekey, in issuing the orders in question, and obtaining the money thereon from the bank, are such as to render the sureties liable on the bond.

The statute does not provide what shall be the terms of the bond of a county auditor. 1 G. & H. 122, sec. 2. We presume, and therefore assume, that it is intended to secure the faithful performance of the duties of his office.

Counsel for appellant relies upon sections three and four of the same act. They are as follows:

The State, *ex rel.* The Logansport National Bank, *v.* Kent *et al.*

“Sec. 3. The auditor, by virtue of his office, shall be clerk of the board of county commissioners of his county, and shall keep an accurate record of all the corporate proceedings of such board, and shall preserve the documents, books, records, maps and papers deposited in his office, and at the expiration of his term, deliver the same to his successor.

“Sec. 4. He shall examine and settle all accounts and demands chargeable against his county, which are not directed to be settled and allowed by some other tribunal or person; and for all such sums of money settled and allowed by himself, such other tribunal or person, or where the same is fixed by law, he shall issue his orders on the treasurer of the county, payable to the person entitled thereto, which orders shall be numbered, progressively, and the number, date, and amount of each, and to whom payable, and the purpose for what” [which] “drawn, shall, at the time of issuing the same, be entered in a book kept for that purpose.”

Counsel urge that the sureties undertake for their principal:

“1. That he shall correctly keep the records of the board of county commissioners of the county.

“2. That he shall issue no orders except in the cases provided for by law, and not make use of the records and blank orders in his possession, except for the purposes provided for in section 4 of the auditor’s act.

“3. That, for the information of his principal, the board of commissioners, he shall keep an accurate register of all orders actually issued.”

Counsel for appellee refer to *Carey v. The State, ex rel., etc.*, 34 Ind. 105; *Dæpfner v. The State, ex rel., etc.*, 36 Ind. 111; and *Jenkins v. Lemonds*, 29 Ind. 294; and they contend that the sureties of an officer are only bound to see that the officer performs, correctly, such acts as the law makes it his duty to perform, and that they are not liable for acts that he does, which he is not authorized by law to perform; that it

The State, *ex rel.* The Logansport National Bank, *v.* Kent *et al.*

is not alleged that Ekey failed to perform any official duty, and that, therefore, the sureties are not liable.

It is further urged, that, supposing Ekey was acting officially in issuing the order, he was not so acting when he presented it to the treasurer and obtained his indorsement, nor when he presented the order to the bank and obtained the money thereon; that the relator relied upon the fact that Ekey had possession of the orders, which appeared on their face to be valid, and did not examine the records of the auditor's office, or have any knowledge thereof, and was not, therefore, misled thereby; that, as the relator did not examine the records of the auditor's office, it cannot be successfully claimed that she was, in any way, damaged by the false entries made therein.

We do not think it necessary to put the case on the ground that the officers of the bank should have examined the records in the auditor's office; for it seems to us clear that the injury of which the bank complains is not one for which the sureties are responsible. Conceding that the issuing of the orders was an official act, and that, for any damages resulting from that act, the sureties would be liable to any one damaged thereby, still, this is not the act which damaged the bank. Had that been the only act done by the auditor, it is clear that the bank would have suffered no inconvenience. The act of the auditor in having the treasurer make the indorsement on the order was not an official act as auditor. Indeed, we do not see that that act could result in damage to any one. Its only effect was to cause the order to bear interest from the date of such indorsement. 1 G. & H. 641, sec. 8. But the act which resulted in the damage sustained by the bank was the presentation and sale of the order to it, and thereby obtaining the money of the bank. We think it quite clear that this was not an official act. It was an act which might as well have been done by any other person, had he held the order, as by the auditor. It had no relation whatever to his official duties, and could not, with any reason, have been so understood by those act-

The State, *ex rel.* The Logansport National Bank, *v.* Kent *et al.*

ing for the bank. The liability of sureties is not to be extended, by implication, beyond the terms of their contract. The undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms. *The United States v. Boyd*, 15 Pet. 187.

As bearing upon this question, we may cite the following cases in this court, in addition to those cited by counsel for appellee: *The State, ex rel. Arnold, v. Givan*, 45 Ind. 267, and *The State, ex rel. Roberts, v. Fleming*, 46 Ind. 206.

In our opinion, the court committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

WORDEN and PETTIT, JJ., dissenting.

We do not concur in the opinion of the majority of the court in this case. The orders alleged to have been falsely and fraudulently issued by the auditor were issued under color of his official authority. The issuing of them was, in our opinion, a breach of his official bond, and for such breach, any person, being injured thereby, may recover damages. It may be conceded that the auditor did not, as auditor, present the orders to the treasurer for redemption or indorsement, or transfer them to the relator. These things, it may be assumed, he did in his individual capacity. But these things he could not have done, if he had not, in his official capacity, issued the orders. If the auditor had passed the orders to some one else, and they had afterwards, in due course of business, come to the hands of the relator for value, we think the sureties on the bond would be liable to the relator, because the relator could not have been thus defrauded, had not the orders been issued in violation of law and the duty of the auditor.

Marshall v. Beeber.

MARSHALL v. BEEBER.

53	119
160	253

PLEADING.—*Striking Out Pleading.*—Complaint for the value of goods sold and delivered by the plaintiff to the defendant. Answer, that there was a defect of parties, in that the plaintiff had no interest in the cause of action; that said goods were sold by the plaintiff to a third person named, and by him to the defendant; and that the defendant never purchased of the plaintiff any portion of said goods.

Held, that there was no error in striking out this answer on motion, there being an answer of general denial remaining.

SUPREME COURT.—*Instructions to Jury.*—The Supreme Court cannot review the action of the court below in giving or refusing an instruction to the jury, where there is no bill of exceptions in the record, and it does not appear that any exception was taken to the ruling of the court below.

From the Grant Circuit Court.

J. A. Cotton and *R. W. Bailey*, for appellant.

I. Van Devanter, *J. F. McDowell* and *D. V. Burns*, for appellee.

DOWNEY, C. J.—This was an action by the appellee against the appellant for the price and value of lumber sold and delivered. The defendant answered in three paragraphs, the second of which was a general denial.

On motion of the plaintiff, the court struck out the first and third paragraphs of the answer.

Upon the issue formed by the general denial, there was a trial by a jury, and a verdict for the plaintiff. A motion for a new trial, made by the defendant, was overruled, and there was judgment for the plaintiff for the amount of the verdict.

Errors assigned:

1. Sustaining the motion to strike out the first and second paragraphs of the answer.

2. Overruling the motion for a new trial.

Other errors are stated, but they are only reasons for a new trial, and we take no further notice of them.

We examine the errors properly assigned.

The first paragraph of the answer was properly struck out, for the reason that it amounted to nothing more than the

general denial. It states that there is a defect of parties herein, in this, to wit, that the plaintiff herein has no interest in the cause of action; that the lumber, the price of which is sued for, was sold by the plaintiff to one George W. Sayles, and by Sayles to the defendant; and that defendant never purchased of plaintiff any portion of said lumber. If the defendant never purchased the lumber of the plaintiff, we do not see that there can be any better form in which to present that question than by the general denial.

As to that part of the first assignment of error which complains of striking out the second paragraph of the answer, it is sufficient to say that no such motion or ruling seems to have been made.

There is no question presented under the second alleged error which we can decide. Counsel complain of instructions given, and others refused, but there is no bill of exceptions in the record, nor does it, in any way, appear that any exception was taken to the rulings of the court, either in giving or in refusing to give instructions.

The judgment is affirmed, with ten per cent. damages and costs.

KNARR ET AL. v. CONAWAY ET AL.

53	120
138	580

53	120
155	284

ASSIGNMENT OF ERROR.—*Change of Venue.*—*New Trial.*—The erroneous refusal of a change of venue is a cause for a new trial, and therefore cannot, on appeal to the Supreme Court, constitute the ground of an assignment of error.

SAME.—*Pleading.*—*Parties.*—The fact that the parties to an action are not named at the commencement of the complaint will not, on appeal to the Supreme Court, sustain an assignment of error that the complaint does not state facts sufficient to constitute a cause of action.

SAME.—*Clerk's Certificate to Transcript.*—*Exhibits.*—Where, on appeal to the Supreme Court by the defendant in an action, the clerk's certificate to the transcript of the record does not show that the transcript contains all

Knarr et al. v. Conaway et al.

the papers filed in the cause, the fact that copies of notes and a mortgage constituting the foundation of the action, which the complaint alleges are filed with it, do not appear in the record, will not support an assignment of error that the complaint does not state facts sufficient to constitute a cause of action.

From the Ripley Circuit Court.

W. D. Willson and *G. Durbin*, for appellants.

H. W. Harrington, Ward & Rebeck and *Gordon, Browne & Lamb*, for appellees.

DOWNEY, C. J. — This is a second appeal in the same case. The case when here before is reported in 42 Ind. 260. After the cause went down to the circuit court, the application for a change of venue was renewed by the defendants, on the affidavit previously filed, and was again overruled. The defendants excepted, and filed their bill of exceptions. The plaintiff filed what is denominated a substituted complaint, to which the defendants were ruled to answer. This they failed to do, and the rule was closed. The cause was then submitted to the court for trial, and there was a finding and judgment for the plaintiff.

Two errors are assigned:

1. The refusal to grant a change of venue.

2. That the complaint does not state facts sufficient to constitute a cause of action.

1. The improper refusal of a change of venue is a reason or ground for a new trial, and not a matter that can be assigned for error in the first instance. Buskirk's Prac. 224.

2. One objection urged to the substituted complaint is, that the parties are not named at the commencement of it. This was probably the omission of the clerk in copying the substituted complaint. At all events, the objection is not one that goes to the sufficiency of the facts to constitute a cause of action.

The only other objection to the substituted complaint is, that although it states that copies of the notes and mortgage are filed with it, they do not appear in the record. The appellant has not brought up a complete record. It does

Todd v. Collier.

not profess, according to the clerk's certificate, to contain all the papers filed in the cause. For this reason, this objection cannot be sustained. If the clerk's certificate showed that the transcript was a complete one, the objection would be well taken.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

TODD v. COLLIER.

VENDOR AND PURCHASER.—Purchase-Money.—Rescission.—Where, by the terms of a contract for the sale of real estate, it is not provided that the purchaser shall have possession, and the legal title remains in the vendor, to whom a portion of the purchase-money has been paid, and the purchaser, having received possession of the land, has failed to pay an installment of purchase-money due, and the vendor has by suit recovered possession of the land (which, under such circumstances, he may do), such recovery will not amount to a rescission of the contract or entitle the purchaser to recover the part of the purchase-money paid by him.

From the Washington Circuit Court.

S. B. Voyles and *T. Huston*, for appellant.

T. L. Collins and *A. B. Collins*, for appellee.

DOWNEY, C. J.—This was an action by the appellant against the appellee.

On demurrer by the defendant to the amended complaint, the same was adjudged insufficient, and there was final judgment for the defendant. The ruling of the court on the demurrer to the amended complaint is assigned as error.

The facts disclosed in the complaint are, that, in May, 1869, the defendant was the owner of a town lot in Campbellsburg, in Washington county, Indiana, and sold the same to the plaintiff, but for what price is not shown; that one hundred dollars of the purchase-money was paid in

Hanlon v. The Board of Commissioners of Floyd County.

hand, and another hundred dollars became due in May, 1871, the plaintiff being in possession of the lot; that the defendant, without tendering a deed for the lot, instituted a suit against the plaintiff before a justice of the peace for possession of the lot, and, in October, 1871, obtained judgment, turned the plaintiff out of possession, and has ever since held possession. It does not appear whether the contract was in writing or not, nor are its terms definitely stated.

It is further alleged, that the defendant has not restored, or offered to restore, the said sum of one hundred dollars, and judgment is demanded therefor, with interest.

The action is brought on the ground, we presume, that there had been a rescission of the contract, and that, therefore, the plaintiff was entitled to recover the part of the purchase-money which he had paid. It does not appear from the contract, as it is disclosed, that the plaintiff was to have the possession of the lot, and as the legal title was in the defendant, and the plaintiff had failed to pay the second instalment of the purchase-money, she was entitled to recover the possession of the lot. *Kratemayer v. Brink*, 17 Ind. 509.

The fact that she thus sued for and recovered possession of the lot, to which she was so entitled, did not, in our opinion, amount to a rescission of the contract, or entitle the plaintiff to sue for and recover the money which he had paid.

The judgment is affirmed, with costs.

HANLON v. THE BOARD OF COMMISSIONERS OF FLOYD COUNTY.

COUNTY AUDITOR.—*Salary.*—*Constitutional Law.*—That portion of section 11 of the act of March 12th, 1875 (Acts 1875, Spec. Sess. 31), which provides for an increased compensation to a county auditor where the popu-

53	123
130	447
53	123
137	572
53	123
147	193
53	123
151	145

Hanlon v. The Board of Commissioners of Floyd County.

lation of the county exceeds fifteen thousand, is not in conflict with the constitutional prohibition of the passage of local or special laws in relation to fees or salaries.

SAME.—Construction of Statute.—In determining the amount of the allowance to a county auditor under said section 11, the last census taken by the United States must be looked to, for the purpose of determining whether there is an excess of population over fifteen thousand, and also the amount of the excess; and the increase of compensation provided for by said section can be made only by adding to the allowance of fifteen hundred dollars, provided for each county without regard to population, the sum of one hundred and twenty-five dollars for each one thousand inhabitants in excess of fifteen thousand, no addition being authorized for a fractional part of one thousand inhabitants.

SAME.—Stamps.—Post-office Box.—No allowance can be made to a county auditor for stamps for the use of his office or for post-office box rent.

SAME.—School Fund —Construction of Statute.—By the words "school fund of the county," used in section 12 of said act of March 12th, 1875, providing that "auditors shall receive one per cent. for managing the school fund of the county," reference is made to that fund only which by section 2 of the act of March 6th, 1865, 3 Ind. Stat. 440, is made a permanent fund never to be diminished in amount; and it was not intended by said words to embrace state taxes for school purposes, special school taxes, local school taxes, interest on common school fund, interest on congressional school fund, or taxes distributed to the county.

BUSKIRK, J., dissented, holding that under said words, "school fund of the county," it was intended to include the income of the various permanent school funds.

From the Floyd Circuit Court.

J. H. Stotsenburg, for appellant.

G. V. Howk and *W. W. Tuley*, for appellee.

WORDEN, J.—The appellant filed an account before the board of commissioners of the county, for his services as auditor of the county, for four months, from November 1st, 1875, when his term of office commenced, to March 1st, 1876. The board not making such an allowance as was satisfactory to the appellant, he appealed to the circuit court, where the cause was tried, and judgment rendered for the appellant, but for an amount not sufficient to meet the views of the appellant; hence he appeals to this court.

The auditor's compensation, in the way of salary and fees,

Hanlon v. The Board of Commissioners of Floyd County.

is governed by sections 11 and 12 of the act of March 12th, 1875, Acts 1875, Spec. Sess., 31.

Section 11 of the act is as follows:

“The auditor of each county shall be allowed the sum of fifteen hundred dollars per year for his services, and no more, except as provided in this act. When the population of the county exceeds fifteen thousand, as shown by the last preceding census, taken by the United States, the additional sum of one hundred and twenty-five dollars, for each one thousand inhabitants of such county over fifteen thousand, shall be allowed to such auditor, and one hundred dollars for making all reports required by law to the Auditor of State. Such allowance shall be made in quarterly instalments by the board of county commissioners during their regular sessions in March, June, September and December, and paid out of any county revenue of such county not otherwise appropriated; but payment shall not be made in advance of services rendered.”

The 12th section of the act, after providing for certain fees to be paid by individuals for services to be rendered by the auditor, but not to be paid out of the county treasury, concludes as follows:

“Auditors shall receive one per cent. for managing the school fund of the county.”

The case here involves the validity and construction of section 11 and the construction of the part of section 12, above set out.

It is objected by the appellant that section 11 is local and special, and therefore void, as being in conflict with section 22 of the 4th article of the constitution of this State, which prohibits the passage of any local or special laws on certain specified subjects, including fees and salaries. The objection is pointed to that portion of the section which gives an increased compensation where the population exceeds fifteen thousand. But, in our opinion, the section is neither local nor special, within the true sense and meaning of the constitution; but, on the contrary, it is general and of uniform

Hanlon v. The Board of Commissioners of Floyd County.

operation. It operates uniformly and alike, in all parts of the State, under like facts. It gives the same increase of compensation in all counties where there is the same excess of population. In *Groesch v. The State*, 42 Ind. 547-561, it was said by this court, that "it cannot be held that the framers of the constitution intended that the operation of laws throughout the State should be uniform in any other sense than that their operation should be the same in all parts of the State under the same circumstances and conditions." See, also, *Smith v. Doggett*, 14 Ind. 442.

Regarding the section as valid, we proceed with its construction, so far as it is necessary for the purposes of the case.

It was agreed by the parties upon the trial, that the population of the county, according to the last census taken by the United States, was twenty-three thousand three hundred, but that the actual population of the county, at the time the services were rendered, was thirty thousand. The court allowed the appellant the amount due upon the basis of a population of twenty-three thousand, rejecting the fractional three hundred. The appellant claims that he was entitled to compensation upon the basis of a population of thirty thousand, the actual population at the time of the rendition of the services. He argues that, while, under the statute, the last census taken by the United States must be looked to in order to determine whether there was an excess of population in the county over fifteen thousand, yet that the census should not be looked to in order to determine how much the excess was; in other words, that, having ascertained by the census that there was a population of over fifteen thousand, it was competent to ascertain the amount of the excess by other means than the census. We cannot, however, adopt that construction. The legislature provided no other means than the census, to determine either whether there was an excess of over fifteen thousand or the amount of the excess. In our opinion, it was the intention of the legislature that the amount of the population should be determined by the

Hanlon v. The Board of Commissioners of Floyd County.

census, and that the auditor should be paid according to the population, as shown by the census, where the population, as thus shown, exceeds fifteen thousand. We are also of opinion that the court committed no error in rejecting the fractional three hundred. The statute makes no provision for fractions. It allows the auditor one hundred and twenty-five dollars for each one thousand inhabitants over fifteen thousand. It makes no provision for the excess, unless it amounts to one thousand. If the excess amounts to more than one thousand, but not to two thousand, there is no provision for paying as for an excess of more than one thousand, and so on. We are of opinion, therefore, that the action of the court, so far as we have considered it, was right.

The court rejected a claim of the plaintiff of five dollars for stamps for the use of his office, and one for one dollar and fifty cents for post-office box rent. This was right. The law makes no provision for the payment of such claims, but, on the contrary, prohibits them. The fifteenth section of the act provides, that "the board of county commissioners shall make no allowance, not specially required by this act, to any county auditor, clerk, sheriff or treasurer, either directly or indirectly," etc. If the board of commissioners have no right to allow for such claims, it is clear that the circuit court had none, on appeal from the commissioners. Such expenses, if necessary, must be borne by the auditor. They are a burden which he takes upon himself when he takes the office.

It appeared that the common school fund and the congressional school fund of the county amounted to forty-five thousand one hundred and eighty-seven dollars and fifty-nine cents. The court allowed the appellant the proper percentage on this sum, and about this there is no controversy.

But the appellant claimed one per cent. on forty-one thousand five hundred and fifty-four dollars and thirty-two cents, made up of state taxes for school purposes, special school taxes, local school taxes, interest on common school

Hanlon v. The Board of Commissioners of Floyd County.

fund, interest on congressional school fund, and taxes distributed to Floyd county. This was not allowed. In this the appellant claims the court erred.

We have seen that the statute allows the auditor one per cent. for managing the school fund of the county. The question arises, what is meant by the terms "school fund of the county," as used in the statute?

The constitution, article 8, section 2, determines of what the common school fund shall consist. The second section of the act of March 6th, 1865, 3 Ind. Stat. 440, provides, that "the funds heretofore known and designated as the surplus revenue funds, all funds heretofore appropriated to common schools, the saline fund, the bank [tax] fund, the fund which has been derived, or may be derived, from the sale of county seminaries and the property belonging thereto, the moneys and property heretofore held for such seminaries, all fines assessed for breaches of the penal laws of the State, all forfeitures which may accrue, all lands and other estate which shall escheat to the State for want of heirs or kindred entitled to the inheritance thereof, all lands which have been granted or may be granted hereafter, to the State, when no special object is expressed in the grant, the proceeds of the sales of the swamp lands granted to the State of Indiana by the act of congress of September, 1850, the taxes which may be assessed from time to time upon the property of corporations for common school purposes, the fund arising from the 114th section of the charter of the State Bank of Indiana, shall be denominated the common school fund, and the fund derived from the sale of congressional township school lands, and the unsold congressional township school land at the reasonable value thereof, shall be denominated the 'Congressional Township School Fund,' and shall never be diminished in amount, the income of which, together with the taxes mentioned and specified in the first section of this act, the money and income derived from licenses for the sale of intoxicating liquors, and unclaimed fees, as provided by law, shall be denominated the School Revenue for Tuition;

Hanlon v. The Board of Commissioners of Floyd County.

the whole of which is hereby appropriated and shall be applied exclusively to furnishing tuition to the common schools of the state, without any deduction for the expense of collection or disbursement."

It seems to us to be clear that the terms "school fund of the county," as used in the act of 1875, were intended to embrace that fund only, which, by the act of 1865, is made a permanent fund never to be diminished in amount. The income of the permanent fund, together with such other funds as are to be annually paid out, are denominated the "school revenue for tuition." We cannot think the legislature intended by the use of the words the "school fund of the county" to embrace funds which that body had declared should be denominated "school revenue for tuition." The permanent fund is under the peculiar management of the auditor. It is to be loaned out by him, and collections are to be enforced by him. It was, therefore, appropriate, as a part of his compensation, to give him a per centage on the fund thus managed by him.

The funds on which the court refused to allow the appellant any per centage, it will be seen, constituted no part of the permanent fund, no part of the "common school fund," as provided for by the constitution and statute, but belonged to the class denominated "school revenue for tuition;" and, we think, in this, the court committed no error.

We have thus examined the questions made in the case and find no error in the record.

The judgment below is affirmed, with costs.

BUSKIRK, J.—I do not concur in so much of the foregoing opinion as holds that the auditor is not entitled to one per cent. upon the income of the various permanent school funds. From 1865 to 1873, the auditor received four per cent. for all disbursements of interest derived from said funds. See sec. 107 of school law of 1865, 3 Ind. Stat. 461; sec. 28 of fee and salary act of 1871, Acts of 1871, page 38.

Bonnell v. Allen.

By the fee and salary act of 1873, Acts of 1873, Reg. Sess., p. 126, the auditor was allowed one-fourth of one per cent. upon all school funds disbursed by the auditor. This embraced, not only the interest collected, but the money derived from taxation for school revenue for tuition and special school tax. For construction of these various acts, see *Myrick v. The Board, etc.*, 33 Ind. 383; *Wright v. McGinnis*, 37 Ind. 421; *Adams v. The Board, etc.*, 46 Ind. 454; and *Scott v. The Board, etc.*, 51 Ind. 502. In placing a construction upon the words "school fund," as used in the fee and salary act of 1875, we are required to examine all former acts bearing thereon, whether repealed or unrepealed. Buskirk's Prac. 358 to 366. In view of the previous acts bearing upon the question, I am satisfied that the legislature intended to include under the words "school fund" the income of the various permanent school funds. In my judgment, undue importance has been attached to the language of the second section of the school law of 1865, which is set out in the opinion of the majority of the court. The income of the permanent funds and the money derived from taxation are denominated "school revenue for tuition," so as to preclude the possibility of the appropriation of such revenue to the erection and furnishing of school houses, which are provided for by a special school tax.

BONNELL v. ALLEN.

PRACTICE.—*Law and Equity.*—*Injunction.*—Under our code, where a court may enjoin the commission of an act, it may, as a court of equity might have done before the enactment of the code, in the same action and at the same time, grant full relief by rendering judgment for damages already accrued from the commission of such act.

PLEADING.—*Demurrer.*—*Injunction.*—Where, in a suit for an injunction and for damages accrued from the commission of the act, against the future commission of which the injunction is sought, the complaint shows a

53	130
136	84

53	130
169	576

Bonnell v. Allen.

cause of action for such damages, a demurrer thereto for want of sufficient facts should be overruled, though ground for an injunction be not shown.

LANDLORD AND TENANT. — *Manure. — Injunction.* — Where, upon land demised and used either for cultivation or as a dairy farm, manure has been made during the tenancy, partly from the products of the land and partly from food purchased by the tenant, he, in the absence of any express stipulation on the subject, has the right to use such manure by putting it upon the land, but has no right to remove it from the land as his own property; and a suit for an injunction to prevent such removal will lie against him in favor of the lessor, who, in the same action, may recover damages for such manure already so removed.

From the Vanderburgh Circuit Court.

B. Hynes, for appellant.

J. Pitcher and *H. C. Pitcher*, for appellee.

BIDDLE, J.—The appellee filed a bill in equity, charging that the appellant was occupying a certain tract of land, as the tenant of appellee; that during such occupancy, a large amount of manure was made upon said land, in the ordinary way, from the consumption of the products of said land; that the appellant had removed a part of said manure, and was proceeding to and would remove the residue; that such removal would be of great and irreparable damage and injury to him, for which he would have no adequate remedy at law; and praying that appellant be compelled to account for the manure removed, and that judgment be rendered against him for its value, and that he be restrained and enjoined from removing the residue of said manure. A prayer for a temporary injunction was added.

The lease under which the tenancy existed was made an exhibit to the complaint. A temporary restraining order was granted until the further order of the court.

At the ensuing term, the appellant filed a demurrer to the complaint, which was overruled by the court, to which the appellant excepted, and filed his answer, in which he admitted the tenancy, the removal of part of the manure and the intention of removing the residue, but says that the manure was made from food purchased by him and fed to his own

Bonnell v. Allen.

stock; that he occupied and used the premises as a dairy, and not as an agricultural farm, and that he used thereon all the manure that was necessary or proper. To this answer a demurrer was filed by the appellee and overruled by the court, to which the appellee excepted, and filed his reply in two paragraphs, the first a general denial, and the second alleging that the manure was made partly from the products and partly from food purchased. The cause was submitted to the court for trial, which found for the plaintiff, that he was entitled to recover the sum of forty-five dollars, and that the injunction be made perpetual. The appellant excepted and moved for a new trial, which was overruled, and exception was taken, and judgment was rendered in accordance with the finding.

The first error assigned is overruling the demurrer to the complaint.

It is contended by the appellant, that "when it does not appear from the allegations of the complaint that there is no remedy at law, or that it is inadequate, or that the complainant is entitled to more speedy relief than can be obtained by the ordinary process of the courts of law, an injunction will be denied. *Mullen v. Jennings*, 1 Stock. 192; *Hart v. Marshall*, 4 Minn. 294. When complainant's equity is based upon a claim for unliquidated damages for a substantive injury, for which ample remedy exists at law, and there is no impediment to bringing the action in a legal forum, an injunction will not be granted. High on Inj. 21. In fact, this rule is so well established, that it does not need to be sustained by citation of authorities or by elaboration of argument.

"The mere averment in a complaint that the party has no adequate remedy at law, and without the aid of a court of chancery he would suffer irreparable injury and damage, is not enough to authorize the interference of such a court. The facts stated in the complaint must show that the interposition of the court is necessary for the full and complete protection of the party, and that in the law courts he cannot

Bonnell v. Allen.

have all the redress to which he is entitled. High on Inj., sec. 35.

“The complaint in this record shows no such facts. At the most, it simply avers a state of facts which would entitle the plaintiff to his action at law for damages for the conversion of his property by the defendant to his own use. There is no averment of the insolvency of the defendant, nor of any other fact which tends to show that if the plaintiff had brought his action for the value of the manure removed, he could not have been amply compensated, nor that it would not have been the same with reference to any of the manure which might be subsequently carried off by the defendant.

“Equity will not restrain waste except where it appears that the injury sought to be restrained will be destructive of the estate of inheritance or productive of irreparable mischief, nor where it is susceptible of perfect pecuniary compensation, and for which satisfaction in damages may be had at law. High on Inj., sec. 421.”

This argument is well presented, but we are not convinced that the present case is brought within its meaning. The constitution of Indiana, article 1, section 12, 1 G. & H. 29, declares, that “justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.” And the first section of our code of procedure enacts, “that the distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished, and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action.” 2 G. & H. 33. We no longer have courts of law and courts of equity. All our courts are courts of law *and* equity. We do not send a party to a court of law to establish his right in certain cases before he can resort to a court of equity. Whatever judgment he is entitled to upon the case made, he will receive, whether it be at law or in equity. The mode of procedure is the same in all civil cases. This relieves us

Bonnell v. Allen.

from much of the old technical embarrassment which originally surrounded equity in its struggles to aid law and enforce justice. Although the rule of law and the rule in equity must forever remain distinct from each other, because they are inherently different, yet they may now be administered together in the same court, in the same action, and at the same time. But there were many cases before the enactment of our code, where equity, when it once obtained jurisdiction of its own right, retained the case and granted full relief, although a portion of the redress might have been obtained in a court of law; and we think the case before us is one of that kind. The court had jurisdiction to grant the injunction, and undoubted power to grant full relief for any wrong the complainant had suffered before he made his application.

The first case we can conveniently find in support of this view is *Pulteney v. Shelton*, 5 Ves. 147, where an injunction was allowed against carrying away from the premises dung, soil, etc. In the case of *Onslow v. ———*, 16 Ves. 173, a similar ruling was held, enjoining the tenant from removing the crops, manure, etc. In the *United States v. Gear*, 3 How. U. S. 120, digging lead ore from the lead mines upon the public lands was restrained by injunction. An injunction will lie to prevent a threatened trespass upon lands, "to quarry and remove asphaltum therefrom." *More v. Massini*, 32 Cal. 590.

As early as 1785, Lord Byron was enjoined from interfering with the natural flow of the stream from the "pieces of water" in his park to a certain mill, without having been first sued at law. *Robinson v. Lord Byron*, 1 Bro. C. C. 588.

In the year 1802, Lord Chancellor ELDON said: "The law as to injunctions has changed very much; and lately they have been granted much more liberally than formerly they were. Formerly, when legal rights were set up to the extent, in which they are set up in this case, the court were very tender in granting injunctions. I remember, when in a case of trespass, unless it grew to a nuisance, an injunction

Bonnell v. Allen.

would have been refused; and even in the case of waste, if by temporary acts, from time to time merely, the subject of an action, and not bringing along with it irreparable mischief, Lord HARDWICKE thought, it was granted only as following the relief. Lord THURLOW had great difficulty as to trespass. I have a note of a remarkable case, in which the name of one of the parties was Flamang. There was a devise of close A. to a tenant for life; the lessor being landlord of an adjoining close B. The tenant dug a mine in the former close. That was waste from the privity. But when we asked an injunction against his digging in the other close, though a continuation of the working in the former close, Lord THURLOW hesitated much; but did at last grant the injunction." *Hanson v. Gardiner*, 7 Ves. 305.

But whether an injunction would lie in this case or not, we think the demurrer was properly overruled, because the complaint, in other respects, shows a good cause of action. *Owens v. Lewis*, 46 Ind. 488.

The second error complained of is overruling the motion for a new trial; and under this assignment, the only question discussed by the appellant is the ownership of the manure. He reasons as follows:

"The land in this case was not leased for the purposes of an agricultural farm, but for those of a dairy farm. The lessor 'restricts the use of said premises to and for the purpose and objects of a dairy farm, with the privilege of raising such usual and customary vegetables as may suit the tenant to raise, and also such crops as may be consistent with the aforesaid use as a dairy farm; *but the farm is not rented for the purpose of tillage or cultivation*, but for such uses only as are consistent with the general purpose of making it a dairy farm.'

"The testimony showed that the lessee occupied and used the farm solely as a dairy farm, raising nothing thereon except a little hay and corn; and that he had on the place between sixty and seventy-five head of cattle and eight horses. Also, that four-fifths of the food fed to his stock was

Bonnell v. Allen.

bought by him, and that more manure was spread upon the place than was made from the products of the farm; and that this was all that a proper and careful use of the farm, for the purpose for which it was rented, required.

“However sound may be the rule that all manure produced upon land rented for agricultural purposes belongs to and must remain upon the land, it cannot be made applicable to lands rented for other purposes.”

The case of *Middlebrook v. Corwin*, 15 Wend. 169, is very similar to the case before us. “Middlebrook sued Corwin in a justice’s court, for several loads of manure carried away from a farm occupied by one Van Cleft as tenant to Middlebrook for a year. The farm was stocked by Middlebrook with twenty milch cows, a pair of working cattle, and other cattle. The manure was sold by the tenant to the defendant, and taken from the barnyard of the farm shortly before the expiration of the tenant’s term. The justice rendered judgment in favor of the plaintiff, which was reversed by the Orange Common Pleas, on *certiorari*,” but the judgment of the common pleas was reversed by the Supreme Court, and that of the justice affirmed. The only distinction between the cases is, that in the case cited, the lessor owned the cows and other cattle. The same rule is held in *Lewis v. Lyman*, 22 Pick. 437. In Taylor’s Treatise on Landlord and Tenant, p. 423, sec. 541, the author says:

“Where a farm is taken for agricultural purposes, and there is no particular agreement as to the manure that will be made on it during the occupation of the tenant, the manure does not belong to the tenant, but to the farm, and must be used on the farm; and the tenant has no more right to remove it before the expiration of his term, or to dispose of it to others, than he has to remove or dispose of any fixture belonging to the farm.” And in a note it is stated:

“This doctrine is confined to farms let for agricultural purposes; but in *Wain v. O’Connor*, a milk farm was held to be a farm used for agricultural purposes, so far as the

right to remove the manure was concerned." In the same section, 541, the author says:

"A different rule, however, has been laid down in South [North] Carolina, where it is held that a tenant who is about to remove, has a right, if there is no covenant or custom to the contrary, to all the manure made by him on the farm; that it is his personal property, and he may remove it as such; but this case is clearly at variance with all other American decisions on this subject." And he cites *Smithwick v. Ellison*, 2 Ire. 326, in support of the text.

In the case of *Lewis v. Jones*, 17 Pa. St. 262, it was held, that "an out-going tenant has no right to remove, from the land he occupied, manure made on the land, from its produce, during his occupancy; and the fact that he bought *some* hay and *some* grain, and fed the grain so bought to his horses, will not alter the case, so long as the manure so made is commingled with that made from the produce of the farm."

It may be held as settled that the tenant has the right to use the manure by putting it on the land of the farm which he occupies, as it accumulates, but he has no right to remove it or sell it off from the farm as his own property.

In the case of *Daniels v. Pond*, 21 Pick. 367, the court was of opinion, "that manure made on a farm, occupied by a tenant at will or for years, in the ordinary course of husbandry, consisting of the collections from the stable and barnyard, or of composts formed by an admixture of these with soil or other substances, is, by usage, practice and the general understanding, so attached to, and connected with, the realty, that, in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove the manure thus collected, or sell it to be removed, and that such removal is a tort, for which the landlord may have redress; and such sale will vest no property in the vendee." We believe this view correctly expresses the law upon the subject. A later case affirms the same rule. *Sawyer v. Twiss*, 6 Fost. N. H. 345.

Meiners v. Munson.

If we are correct in this view, there is no error in the record we are considering.

The judgment is affirmed, with costs.

MEINERS v. MUNSON.

HUSBAND AND WIFE.—*Credit Given to Wife.*—*Agency.*—*Ratification.*—A person furnished and put upon the house of another a lightning rod, at the request of the wife of the latter, without the knowledge or consent of her husband, she having no authority from him to act as his agent in such transaction, or in any business, and not professing to act as his agent in said transaction, in which no allusion was made to the husband, the account for the work being made out against the wife alone.

Held, that the *prima facie* inference arising from these facts was that the credit was given solely to the wife, and, such inference not having been rebutted, that the husband was not liable for said work.

Held, also, that, the wife having no authority to act as her husband's agent and not professing to so act, the contract could not be ratified by the husband as principal.

From the Marion Superior Court.

D. V. Burns, for appellant.

J. W. Nichol and L. Jordan, for appellee.

WORDEN, J.—Action by the appellee against the appellant, for the value of certain lightning rods furnished by the plaintiff, and by him put upon the house of the defendant, and to enforce a lien therefor. The complaint alleges, "that on the —— day of ——, 1873, he" (the plaintiff) "furnished to said defendant, at the request of defendant's wife, and that the defendant ratified and affirmed the same, and retained two hundred feet of lightning rod, at and for the price of seventy-five dollars; that he placed the same on the dwelling-house of said defendant," etc. With the complaint was filed the following bill of particulars, viz.:

Meiners v. Munson.

“INDIANAPOLIS, IND., 8th September, 1873.

“Mrs. C. Meiner to David Munson, manufacturer of lightning rods, Dr.

“May 15th, to 200 feet of lightning rods, 37.50, \$75.00.”

Issue was joined, and the cause tried by the court, resulting in a finding and judgment for the plaintiff. The judgment was affirmed at general term below, and appeal is taken to this court. The following was the evidence in the cause :

W. O. Gardner, being sworn, testified :

“Was working for the plaintiff in May last, putting up lightning rods; while passing house of defendant, his wife called me in and told me to fix the lightning rod on the house, that it was broken. I examined the old rods, and told her they couldn't be fixed, but that I would put her on new ones. She asked what it would cost; told her I did not know; she said, ‘Fix it right and safe.’ I then put on two hundred feet of new rods. It was worth seventy-five dollars. The account, as set forth in the bill of particulars, is correct; do not know Mr. Meiners; have never seen him.”

On cross-examination, he testified :

“Can't tell how much old rod there was on; I put the new all over the house and back on the sheds; there were only two points to the old rod; there are five points to the new; she asked me how much it would cost, but I did not even intimate whether it would cost five dollars or one hundred dollars; gave her no idea as to what it would cost; I don't know what I did with the old rod; we generally take them away; they are not worth anything.”

David Munson testified :

“I am the plaintiff; I know nothing about the case, except that I have seen the rods on the house, and that the account is not paid; I deliver the rods to the workmen, and take the accounts from their books; have never seen the defendant.”

James M. Bryden testified :

Meiners v. Munson.

"I am engaged with Mr. Munson in the lightning rod business, am his foreman; the rods on defendant's house are properly put on; do not know the defendant."

The defendant introduced the following evidence: Cornelius Meiners testified:

"Am the defendant; was out of the city at the time the rods were put on; I think was out of the city two or three weeks at that time; my wife has been an invalid for years; she is not, and has never been, my agent for the transaction of any business; my daughter has all the care of the house; I have never examined the rods, to see how they are put on, or wherein they differ from the old ones, except that the old ones were only on the front of the house, and these are put back on the sheds, where the house is low; I did not authorize any one to put them on or to have them put on; I do not believe in them very much, anyhow."

On cross-examination, he testified:

"My wife is not my agent for any purpose; she has been unfit to do anything for the last two years; my daughter takes care of the house; I was displeased, when, on coming home, I found the rods on, and so told my wife; she said they wouldn't tell her what it would cost, and that she had ten dollars in the house, out of which she expected to pay the bill; that if she had known it would cost more, she would not have had it done; I never interfered with the rods, and never went to see anything about them."

It was admitted by defendant that if plaintiff recovered judgment, he was entitled to his lien; and this was all the evidence given in the cause.

The question is before us, whether, on this evidence, the plaintiff was entitled to recover.

It seems that the plaintiff's agent, Gardner, on being requested by the defendant's wife to fix the old rod, which was broken, told her it could not be done, but suggested, with ready business tact, that he could put on new ones; and on being told by her to "fix it right and safe," put new rods "all over the house and back on the sheds," having

Meiners v. Munson.

five points, instead of two, at the same time keeping her in ignorance of the cost by telling her he did not know, and not intimating to her whether it would cost five dollars or a hundred. The transaction, as testified to by Gardner, though it may show him to have been adroit and successful, is not to be commended as an instance of open and fair dealing on his part. Nevertheless, if the plaintiff is entitled by law to hold the judgment, on the evidence, it must be affirmed; otherwise, it must be reversed.

An important question arising on the evidence is, to whom was the credit given? If given solely to the wife, the defendant cannot be held liable. 1 Chitty on Cont., 11th Am. ed., 236; *Jenkins v. Flinn*, 37 Ind. 349. There is nothing in the evidence that tends to show that credit was given to the husband. The husband was not alluded to, or his name mentioned in any way, so far as appears, during the transaction. Gardner was passing the house, when the defendant's wife called to him and requested him to fix the old rod. He told her it could not be fixed, but he could put on new ones. She then said, after inquiring about the cost, but getting no light on that subject, "Fix it right and safe." Without any further conversation between the parties, Gardner proceeded to embellish the house all over, and back on the sheds, with a multitude of new lightning rods. So far from there being any evidence that the credit was extended to the husband, no allusion whatever was made to him, nor, indeed, does it appear that Gardner, at the time, knew that the defendant's wife had a husband at all. On the contrary, the evidence, unexplained, establishes pretty clearly that the credit was given to the wife. As has been seen, the bill of particulars accompanying the complaint was made out against her. Gardner swore that the account set forth in the bill of particulars was correct. Munson testified that he knew nothing about the case, except that he had seen the rods on the house, and that the account was not paid; that he delivered the rods to the workmen, and took the accounts from their books. It thus appears that the charge was made by

the plaintiff through his agent, Gardner, to Mrs. Meiners, and not to the defendant. This, it seems to us, was *prima facie* evidence, though not conclusive, that the credit was given to Mrs. Meiners alone. See *Connolly v. Kettlewell*, 1 Gill, 260; *Leland v. Creyon*, 1 McCord, 100; *Swift v. Pierce*, 13 Allen, 136. We find nothing in the evidence to rebut the inference thus to be drawn.

But there is another and perhaps more conclusive reason why the evidence is insufficient to sustain the finding. It was not claimed in the complaint that the defendant's wife was authorized by him to have the lightning rods put on the house, but it was alleged that the defendant ratified and affirmed the act. The whole case proceeded on the theory of a ratification. We shall not discuss the question whether the failure of the defendant to pull down the rods, or notify the plaintiff of his dissent, amounted to a ratification. There is another point, which, under all the authorities, as applied to the facts of the case, is fatal to the supposed ratification. We have already seen that the contract, if such contract were made by Mrs. Meiners, by virtue of which the rods were put up, was not made in the name of, or for, or on behalf of her husband; that her husband was not mentioned or in any way alluded to. She dealt, in every respect, as if dealing for herself alone, and not for her husband or any one else.

The rule of law is, that a ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person. Story on Agency, sec. 251 *a*, and authorities there cited. It is said, in 1 Chitty on Cont., 11th Am. ed., 293, "But where the party making the contract had no authority to contract for the third person, and did not *profess*, at the time, to act for him, it seems that the subsequent assent of such third party, to be bound as principal, has no operation."

This doctrine has been recognized and acted upon by this

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

court. *The Terre Haute, etc., R. R. Co. v. Norman*, 22 Ind. 63. Mr. Parsons says, in speaking of a contract entered into by a wife without the authority of her husband, and not professing to act for him, that "we may add that such a case would perhaps fall within the rule, that no act is capable of ratification by the principal which was not performed by the agent *as agent*, and in behalf of the principal." 1 Parsons Cont. 346.

For these reasons, we are of opinion that the judgment below must be reversed.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below at general term, to reverse the judgment rendered at special term, and remand the cause to special term for a new trial.

THE INDIANAPOLIS & ST. LOUIS RAILROAD CO. v. STOUT, ADMINISTRATOR.

RAILROAD.—Injury to Person.—Pleading.—A paragraph of complaint by an administrator against a railroad company charging gross negligence in the construction of a crossing of the railroad over a certain public highway, and that such negligent and defective construction of said crossing caused injuries, which resulted in the death of the plaintiff's intestate, was held sufficient; and another paragraph of said complaint, charging negligence in the construction of the railroad at said crossing, and also in the running of a train on the defendant's road, by which said injuries were caused, was held to be unquestionably good.

ABATEMENT OF ACTION.—Injury to Person.—Action for Death Caused by Wrongful Act.—An action for damages for an injury to the person of the plaintiff abates by his death, and the pendency thereof cannot be pleaded in bar of an action brought by his personal representative for his death resulting from such injury and caused by the wrongful act or omission of the defendant.

PRACTICE.—Judgment on Special Finding, Notwithstanding General Verdict.—Special findings in answer to interrogatories override the general verdict only when both cannot stand; and the Supreme Court will not direct judgment in favor of a party against whom the general verdict has been rendered, unless this antagonism is apparent on the face of the record and

53	143
127	24

53	143
131	566
132	161
132	200

53	143
135	675
136	72

53	143
139	620

53	143
140	264
143	387

53	143
152	87

53	143
162	20

53	143
167	523

53	143
169	467
170	510

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

the special finding cannot, by any hypothesis, be reconciled with the general verdict.

SAME.—*Construction of Section 337 of the Code.*—The inconsistency contemplated by section 337 of the code, because of which the special finding shall control the general verdict, is the inconsistency of the special finding of facts, taken as a whole, with the general verdict, or the exclusion, by the facts found in one or more of the answers to interrogatories, of every conclusion that will authorize the general verdict.

NEW TRIAL.—*Evidence.*—*Special Finding.*—A new trial will be granted for want of evidence to support a special finding of facts by the jury in answer to interrogatories, only when it would be granted for insufficiency of the evidence to support the general verdict.

INSTRUCTIONS TO JURY.—*Refusal of.*—There is no error in the refusal of the court to give to the jury an instruction asked by a party, where the substance thereof is included in instructions given.

SAME.—*Assumption of Fact Admitted by Pleading.*—Where, in an action by an administrator, the defendant by his answer has admitted the character in which the plaintiff sues, the defendant cannot object to an instruction to the jury because it assumes the death of the plaintiff's intestate.

NEGLIGENCE.—*Death Caused by Wrongful Act.*—*Unusual Care.*—In an action to recover damages for the death of a person caused by the wrongful act of the defendant, it was held that the failure of such person to be cool and collected, and to act with perfect prudence and in the exercise of a deliberate judgment, in the presence of an unexpected and deadly danger—to take *unusual* care—constituted no defence to such action.

NEW TRIAL.—*Demurrer.*—Error in ruling upon a demurrer to a pleading cannot be a cause for a new trial.

EVIDENCE.—*Proof of Testimony of Deceased Witness.*—On the trial of an action brought by an administrator to recover damages for the death of his intestate caused by the wrongful act of the defendant, evidence is admissible to prove what was the testimony of witnesses, since deceased, on the trial of an action brought by said intestate, and abated by his death, for damages for injuries caused by said wrongful act.

DEPOSITION.—*Residence of Witness.*—The deposition of a witness, who at the time of the taking of the deposition resided in another state, was properly excluded upon proof that at the time of the trial he was residing in this State, in a county adjoining that in which the trial was had.

INTERROGATORIES TO JURY.—*Motion to Require More Specific Answers.*—There is no error in refusing to require the jury to make their answer to an interrogatory more certain and specific, where such answer, if made more certain and specific, could not control the general verdict.

From the Hendricks Circuit Court.

M. A. Osborn and W. A. Brown, for appellant.

C. P. Jacobs, for appellee.

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

BUSKIRK, J.—The appellee, as administrator of the estate of Peter Stout, deceased, brought this action in the Marion Circuit Court, to recover from the appellant damages resulting from alleged wrongful acts of the appellant, which caused the death of the said Peter Stout.

The venue was changed to Hendricks county, where a trial by a jury resulted in a verdict in favor of the appellee in the sum of two thousand five hundred dollars. The motion for a new trial was overruled, and there was judgment on the verdict.

The first error assigned calls in question the sufficiency of the complaint. The complaint was in two paragraphs. The first paragraph charged gross negligence in the construction of the crossing of the railroad over the Indianapolis and Rockville State road, west of Indianapolis, and that such negligent and defective construction of said crossing caused the injuries which resulted in the death of the appellee's intestate.

The second paragraph charged negligence in the construction of the railroad at the crossing of the Indianapolis and Rockville State road, and also in the running of the train on appellant's road.

We think the first paragraph was good. *Mackay v. N. Y. C. R. R. Co.*, 35 N. Y. 75; *Richardson v. N. Y. C. R. R. Co.*, 45 N. Y. 846; *Shearman and Redfield on Negligence*, 3d ed., secs. 448, 451.

The second paragraph was unquestionably good. The appellant pleaded in bar of this action the pendency of an action brought by Peter Stout, in his own name, and while in life, against appellant, for the injuries which he had received, and which, as is claimed in this action, resulted in his death. Demurrers were sustained to the paragraphs of the answer setting up the pendency of such action. There was no error in this. The death of Peter Stout abated such action. Sec. 782 of the code, 2 G. & H. 330; *Stout v. The I. & St. L. R. R. Co.*, 41 Ind. 149.

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

The jury returned, with their general verdict, answers to interrogatories which were submitted to them. The appellant moved for judgment on such answers, notwithstanding the general verdict, which motion was overruled, and this ruling is assigned for error.

The interrogatories and answers were as follows:

"1. Did Peter Stout stop his team, before he drove upon the track of the railroad?

"Ans. We think not, from the evidence.

"2. Could Peter Stout have stopped his team before going upon the track?

"Ans. He could.

"3. Could Peter Stout have heard the train coming, if he had stopped his wagon and team forty feet before going on to the track?

"Ans. Under the circumstances, we think not.

"4. Could not Peter Stout have seen the train, or some part of it, if he had raised to his feet in his wagon, south-east of the track of the railroad, at any point north of the Holmes House, before going on the track?

"Ans. At one point it would be very difficult.

"5. Was Peter Stout negligent in approaching the railroad crossing?

"Ans. We think he used ordinary care.

"6. Was the bell on the engine rung before it reached the crossing?

"Ans. It was.

"7. Were the brakes on the cars set before the train reached the crossing?

"Ans. Yes, at or near the crossing.

"8. Was the engine reversed and the track sanded, before the engine reached the crossing?

"Ans. Yes, just on or near the crossing.

"9. Were the train men, in charge of the train, guilty of neglect? if so, which of them, and in what act or particular?

"Ans. Yes, the engineer, in not sounding the whistle at a proper distance.

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

"10. Could Peter Stout have known that the train was near and coming, if he had stopped his team and looked and listened for the train, before going upon the track?

"Ans. We think he could have known, if he had stopped immediately before going on to the track.

"11. Could not Peter Stout, sitting in his wagon, or standing upon the ground, at a point forty feet southeast of the track, have seen a train two hundred feet west, approaching the crossing?

"Ans. We think not, on account of the obstructions and weather.

"12. If you find that the defendant was guilty of any negligence which produced the injury and caused the death of Peter Stout, what was the negligence?

"Ans. The engineer was negligent for not sounding the whistle, at a proper distance from the crossing.

"G. S. RICH, Foreman."

A special finding overrides the general verdict, only when both cannot stand; and this antagonism must be apparent upon the face of the record, before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered by the jury upon their oath. Buskirk Prac. 216, and authorities cited.

It is the duty of the Supreme Court to indulge every reasonable presumption in favor of the correctness of the general verdict, which is presumed to have been rendered upon the substantial merits of the matters in controversy. It is also the duty of this court to reconcile, if possible, the general verdict with the answers to the interrogatories; for it is settled that if a special verdict can, by any hypothesis, be reconciled with the general verdict, the latter will control, and the court will not render judgment against the party in whose favor the general verdict is rendered. Buskirk Prac. 216, with authorities cited.

The word "inconsistent," as used in section 337 of the code, 2 G. & H. 206, does not mean that the special findings

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

are inconsistent with each other, nor does it mean that some of the special findings are inconsistent with the general verdict; but it means either that, taken as a whole, the special findings are inconsistent with the general verdict, or that the facts found in one or more of the answers to interrogatories exclude every conclusion that will authorize a recovery for the plaintiff. Buskirk Prac. 216, with authorities cited.

The jury, in answer to the fifth interrogatory, found that the decedent used ordinary prudence; and in answer to the ninth and twelfth interrogatories, they found that the appellant was guilty of negligence. The other findings are not sufficient to control these. None of them are decisive of the questions of care and prudence on the part of the decedent, and negligence on the part of the appellant. The answers to the first and second interrogatories, to the effect that the decedent could, but did not, stop his team, before crossing the railroad track, are materially modified by the answers to the third and fourth interrogatories, which tend strongly to show that the decedent could neither have seen nor heard the approaching train, if he had stopped his team and looked and listened. In the recent case of the *Cleveland, Columbus & Cincinnati R. R. Co. v. Crawford*, 24 Ohio St. 631; S. C., published in 2 Am. Law Times, N. S., p. 211, the following propositions of law, which seem to be fully supported by the numerous authorities cited, are laid down:

“Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed.

“But the omission to use such precautions, by a person injured, will not defeat his action, if, by due diligence in

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

their use, the consequence of the defendant's negligence would not have been avoided.

"Nor will the failure to use such precautions be regarded as negligence on the part of the plaintiff, if, under all the circumstances of the case, a person of ordinary care and prudence would be justified in omitting to use them.

"In an action for damages for alleged negligence, the question of negligence on the part of the defendant, or of contributory negligence on the part of the plaintiff, is a mixed question of law and fact, to be decided by the jury, under proper instructions from the court.

"But, if all the material facts touching the alleged negligence be undisputed, or be found by the jury, and admit of no rational inference but that of negligence, in such case the question of negligence becomes a matter of law merely, and the court should so charge the jury.

"If, however, the testimony be conflicting, the facts uncertain, or the proper inferences to be drawn therefrom doubtful, in such case it would be error for the court to withdraw the case from the jury, or direct them to return a particular verdict."

The answer to the sixth interrogatory finds that the bell was rung, but it does not find that the whistle was sounded.

The answers to the seventh and eight interrogatories find that the brakes on the cars were set, and the engine reversed, and the track sanded, just *on* or *near* the crossing. The performance of these acts just on or near the crossing could not have contributed much to preventing the accident. They should have been performed sooner than they were, to render them effective.

We think the court committed no error in overruling the motion for judgment on the special findings, notwithstanding the general verdict.

The appellant moved the court for a new trial, and assigned therefor various reasons, which will be disposed of in their order.

1. That the verdict of the jury is contrary to the law and

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

the evidence. The verdict cannot be said to be "contrary to law," within the correct meaning of that phrase. *Buskirk Prac.* 239. The evidence is very voluminous and quite conflicting, and there is no valid reason why this case should be taken out of the general rule, that, where there is conflict in the evidence, this court will not usurp the province of the jury.

The second and fourth reasons assigned relate to the interrogatories, and do not constitute valid causes for a new trial, and will not be further noticed.

The third asks a new trial upon the ground that the special findings are not supported by the evidence, but the conflict in the evidence is so great that we cannot, for that reason, grant a new trial. We should only grant a new trial for want of evidence to support a special finding, where the evidence would require us to set aside a general verdict. The same rule should obtain in both cases.

5. That the damages assessed by the jury are excessive. The damages assessed were twenty-five hundred dollars. The damages, under the facts and attending circumstances, cannot be regarded as excessive.

6. The court erred in giving instructions to the jury numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

We set out the entire series of instructions given by the court of its own motion, though the giving of the 12th, 13th and 14th is not assigned as a reason for a new trial, and they are as follows:

"1. This is an action brought by Alfred Stout, administrator of Peter Stout, deceased, against the Indianapolis and St. Louis Railroad Company, to recover damages for the death of said Peter Stout, the result of the injuries alleged to have been received by him on account of the negligence of the defendant, as set forth in the complaint.

"2. The defendant answers, first, by a general denial, and secondly, that the injuries complained of were caused by the negligence of the said Peter Stout, and, to entitle the plain-

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

tiff to recover, the material allegations of the complaint must be established by a preponderance of the evidence.

“3. The plaintiff in this case cannot recover, unless Peter Stout could have maintained an action for injuries received by the same acts of the defendant, her agents or employes, had he lived.

“4. This case presents three questions of fact for the consideration of the jury: Was the death of Peter Stout, deceased, caused by injuries received by him on the 7th day of February, 1871, and produced by a locomotive and train of cars of the defendant coming in collision with the horses and wagon driven by deceased, at a public highway crossing, near the city of Indianapolis, as alleged in the complaint? 2d. Were such injuries to said deceased produced by the culpable negligence of the defendant, her employes or servants? 3d. Did the negligence of the said deceased contribute directly to such injuries?

“5. If the jury find from the evidence that the death of Peter Stout did not result from such injuries as alleged in the complaint, but from other causes, then your verdict should be for the defendant; but if you find that his death was caused by such injuries, then you will inquire whether such injuries were produced by the carelessness or negligence of the defendant, her agents, employes or servants.

“6. If you find from the evidence that Peter Stout was injured by the negligence of the defendant in constructing the crossing of the highway described, or that he was injured by the carelessness or negligence of the defendant's servants or employes, in the management of the train in question, and that the deceased was guilty of no negligence on his part, which contributed to the injury, and that the injury produced or caused his death, then your verdict should be for the plaintiff.

“7. The defendant had the right to build her railroad across the highway described in the complaint, but was required to restore the highway to its former state, so as to not have unnecessarily impaired the usefulness of the

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

said highway; and if you find from the evidence that the defendant in this case constructed a crossing at the place described in the complaint, and that such crossing was, taking into consideration the location and nature of the ground, and the surroundings of the place, constructed in such a manner as to render it easy to approach and cross by travellers and teams on the highway, without danger to persons using reasonable and ordinary care, then the defendant did all that was required of her in making such crossing. If you find that the view of approaching trains was obstructed by means of an embankment, and the defendant further obstructed the view by throwing earth on top thereof, this would charge the defendant with a greater degree of care in running her trains at that point to avoid danger to travellers on the highway, and is a matter to be considered by you in determining the question of negligence.

“8. A traveller, in approaching a railroad crossing on the public highway, is bound to exercise ordinary care and vigilance, in proportion to the danger to be avoided. His vigilance would be quickened by the fact that he could not see the track sideways until he got on or near the track, and if the decedent could not see an approaching train by reason of any obstruction to the view, then he was called to greater care and watchfulness in driving upon the track than if the view had been open; and if he heard, or in the exercise of ordinary care and watchfulness might have heard the noise of the coming train, and then driven upon the track without first fully ascertaining that there was no danger from collision, he was guilty of negligence, and you will find for the defendant.

“9. If you find from the evidence in this case that the decedent was guilty of any negligence on his part, which contributed to the injuries complained of, your verdict should be for the defendant, although you should find that the defendant was also guilty of negligence in the premises.

“10. One approaching, in a wagon, on the highway, the crossing of a railroad, over which trains moving at a high

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

rate of speed are frequently passing, may reasonably be required to assure himself, if he can, by the use of his organs of sight and hearing, that no cars are in dangerous proximity. If the use of such means would give the information, he may properly be charged with such knowledge. If necessary to make such observations, he will be required to reduce the rate of speed at which he is moving, or even to stop his conveyance. On the other hand, the company were required to keep a reasonable lookout at public crossings, and to give such signals of the approach of trains as are calculated to notify the public, when, without such signals and in the exercise of the proper care and caution by the company, their proximity would not otherwise be known. Thus, if the track were concealed from view, and the sound of the train, from high wind or any other cause, was destroyed, it would devolve upon the company to use any other usual and proper method to give notice to persons travelling upon the highway.

“11. If you find from the evidence that Peter Stout, the deceased, did not, before attempting to cross the railroad, endeavor to ascertain whether a train was near, by looking up and down the track, or by using all reasonable means to ascertain whether it would be safe to cross the track, and he went upon the track without investigating beforehand, then he was guilty of negligence, and the plaintiff in this suit could not recover.

“12. If you find from the evidence in this case that the deceased, Peter Stout, used ordinary care and prudence to avoid accident in approaching the crossing, that is to say, such care and caution as an ordinarily prudent man under like circumstances would have used, and when he became aware of his danger, that he used such care as men of ordinary prudence, under like circumstances, would be expected to use to avoid or escape injury, then his negligence did not contribute to the injury.

“13. It is the province of the jury to judge of the credibility of the witnesses and the weight you will give to their

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

testimony ; and in determining this, it is proper for you to consider the interest, if any, they may have in the result of the suit, the opportunity they may have had of acquiring knowledge of the facts about which they testify, and their bias or prejudice, if any they have.

“14. If you find for the plaintiff, it will be your duty to determine the amount which in your judgment the plaintiff should receive. This will be such a sum as you deem a fair and just compensation, taking into consideration the circumstances surrounding the deceased, his family relations, etc., the amount to be determined by the exercise of a sound discretion, but in no event can it exceed the sum of five thousand dollars.”

The first, second and third relate to the issues in the cause, and seem to be entirely fair and unexceptionable.

The first objection urged to the fourth instruction is, that it omits to state anything in reference to contributory negligence on the part of the decedent ; but this objection is not sustained by the record.

The third question relates to contributory negligence on the part of the decedent. Besides, this question is fully covered by the sixth and ninth instructions, which are as favorable to the appellant as it had any right to ask or expect.

It is also objected to the fourth instruction, that it assumes the death of Peter Stout. There is nothing in this objection. The answer admits the character in which the plaintiff sues, and this admits the death of the said Peter Stout ; and hence, the court, in its instructions, had the right to assume that he was dead.

No objections are pointed out to the fifth, sixth, eighth and ninth ; and the tenth and eleventh are conceded to be good. Objections are urged to the twelfth, thirteenth and fourteenth, but, as these instructions are not named in the motion for a new trial, no question is presented in reference to their correctness.

It is claimed that the court should have added to the first

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

branch of the seventh instruction, that the plaintiff could not recover, on account of the construction of the crossing over the highway, no matter how defective it might be, if the injury to the decedent was not caused by such defective crossing. We think the appellant should be satisfied with that portion of the seventh instruction, as the jury were, in effect, informed thereby, that the plaintiff had no right to recover for and on account of the defective construction of the crossing over the highway.

We think the court committed no error in giving the instructions complained of.

7. The court erred in refusing to give instructions to the jury, asked at the proper time by the defendant, and designated by numbers from 1 to 24 inclusive, each number being given.

The first instruction asked is fully covered by the fourth instruction given by the court.

The second, third, fourth, sixth and seventh instructions refused are substantially embraced by the seventh, eighth, ninth and tenth instructions given. The fifth is not in the record.

The eighth instruction asked by defendant was rightfully refused; for it is not reasonable to require a man to be cool and collected and to act with perfect prudence and in the exercise of a deliberate judgment in the face of an unexpected and deadly danger. A man is not bound to decide at his peril as to the most prudent course. In *Buel v. The N. Y. C. R. R. Co.*, 31 N. Y. 314, a person was injured by jumping off a train to avoid danger, whilst others who sat still were not injured, yet he was allowed to recover damages from the company.

The same rule was allowed in the Exchequer Court before Chief Baron POLLOCK. *Greenland v. Chaplin*, 5 Exch. 243.

Failure on the part of Stout to take *unusual* care is no defense to the action. So it has been repeatedly adjudged in cases involving the risk of life and limb. See *Shearman*

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

and Redfield on Negligence, 3d ed., sec. 29, p. 35, and authorities cited in note 1.

In the *I., B. & W. Railway Co. v. Carr*, 35 Ind. 510, it was said: "We think this instruction was correctly refused. It asserts that if the deceased might have seen the train by looking up, it was his duty to do so; and if he failed to look up, he was guilty of negligence, and the action could not be sustained. The evidence shows that the deceased did look up, but we think it most probable that when he did so, the train was so close upon him that, in the confusion of the moment, he stepped in the wrong direction, and thereby lost his life. He is not to be charged with negligence because he did not when suddenly startled by the cry of danger, or by the near approach of the train, do exactly what one not exposed to such peril might think he might or ought to have done."

The ninth and tenth were properly refused, as they were embraced by the thirteenth instruction given by the court.

The eleventh and twelfth are covered by the fifth instruction given by the court.

The thirteenth instruction was properly refused, because the court correctly instructed the jury in reference to the credibility of the witnesses and the weight which should be given their evidence in the thirteenth instruction given by the court of its own motion.

The fourteenth, fifteenth and sixteenth relate to the construction of a railroad track over a highway. The seventh instruction given by the court properly expressed the law on that subject.

The seventeenth instruction asked related to the measure of damages, and did not properly express the law, while the fourteenth instruction given did properly lay down the correct rule for determining the damages.

City of Chicago v. Major, 18 Ill. 349; *Chicago & Rock Island R. R. Co. v. Morris*, 26 Ill. 400; *Pennsylvania R. R. Co. v. McCloskey's Adm'r*, 23 Pa. St. 526; *Oldfield v.*

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

New York & Harlem R. R. Co., 3 E. D. Smith, 103; *Railroad Company v. Barron*, 5 Wal. 90.

The eighteenth instruction was correctly refused, as the matters embraced therein were covered by the second, sixth and ninth instructions given.

The nineteenth was fully covered by the fifth given.

While the twentieth instruction correctly expressed the law, the appellant was not injured by its refusal, as the seventh, eighth and tenth instructions given substantially covered the same ground.

The twenty-first is not in the record.

The twenty-second instruction related to a statement, alleged to have been made by one of the counsel for appellee, in reference to the conduct of a witness, whose deposition was offered in evidence, but as the deposition was rejected, and as the witness did not testify in person, we are unable to see how the statement complained of prejudiced the appellant.

The twenty-third instruction asked related to the question of contributory negligence, and, as has been seen, the court fully and correctly instructed the jury in reference thereto.

The twenty-fourth related to the credibility of a particular witness and the weight which should be given his evidence, but was properly refused, as the court had given a general instruction on that subject.

The eighth reason for a new trial was, that the court had erred in sustaining a demurrer to the second paragraph of the answer. This was no cause for a new trial.

The ninth, tenth and eleventh causes for a new trial are based upon the action of the court in overruling motions to suppress parts of the depositions of Drs. Wall and Todd, and in permitting such parts to be read to the jury. The answer to the fourth interrogatory in Dr. Todd's deposition was improper, and was struck out. We think the residue of the questions and answers were proper, and the court committed no error in reference thereto.

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

The twelfth cause presents the question whether the court erred in refusing to suppress the deposition of Charles Smith, and in permitting the same to be read in evidence. The point relied upon is this: Peter Stout lived for some time after he was injured by the railroad collision. He brought an action against the appellant to recover damages for such injury. Upon the trial of the cause, he and two other witnesses, who were dead at the time of the trial of the present action, were examined and testified as witnesses. The deposition of Charles Smith was taken for the purpose of proving what was the evidence of such witnesses upon the former trial. It is claimed that such evidence was incompetent upon the grounds:

1. That the causes of action were not the same.
2. That the parties are not the same.

The action of Peter Stout was based upon the common law liability of the appellant, while the present action is based upon a statute; but the foundation of the action in each case was the injury caused by the negligence of the appellant. The death of Peter Stout, after verdict and before judgment, caused the action to abate. *Stout v. I. & St. L. R. R. Co.*, 41 Ind. 149. Upon his death, his administrator brought the present action. We think the causes of action were the same. The parties are not the same, but Greenleaf, in section 164, p. 190, 1 Greenl. Ev., says:

“The admissibility of this evidence seems to turn rather on the right to cross-examine, than on the precise nominal identity of all the parties. Therefore, where the witness testified in a suit, in which A. and several others were plaintiffs, against B. alone, his testimony was held admissible, after his death, in a subsequent suit, relating to the same matter, brought by B. against A. alone. And though the two trials were not between the parties, yet if the second trial is between those who represent the parties to the first, by privity in blood, in law, or in estate, the evidence is admissible.”

Our statute makes the administrator the representative of

The Indianapolis and St. Louis Railroad Co. v. Stout, Administrator.

the deceased. Sections 782 and 784, 2 G. & H. 330. We think it was clearly competent to prove what the evidence of these witnesses was upon the former trial.

The thirteenth and fourteenth causes call in question the correctness of the action of the court in excluding the deposition of Sylvester Clements. When the deposition was taken, the witness resided in the State of Illinois. When it was offered in evidence, the appellee was permitted to prove that such witness was then residing in the county of Marion, and State of Indiana. The county of Marion, where the witness resided at the time of the trial, and the county of Hendricks, where the trial was had, adjoin each other, and no other county intervenes between them. In such case, the deposition of a witness can be taken, where such witness was not able to attend. Section 250 of the code, 2 G. & H. 175. It is provided by sec. 259, 2 G. & H. 177, that "when a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that the cause for taking and reading it still exists." See *Haun v. Wilson*, 28 Ind. 296; *O'Conner v. O'Conner*, 27 Ind. 69; *Shirts v. Irons*, 37 Ind. 98. We think the deposition was properly excluded.

The fifteenth cause for a new trial relates to the alleged misconduct of one of the attorneys for appellee. We have already stated, in speaking of the refusal of the court to give the twenty-second instruction asked, that the appellant was not injured by such alleged misconduct.

The sixteenth and last cause for a new trial is based upon the refusal of the court to require the jury to make their answers to certain interrogatories more certain and specific. We are of opinion that there was no error in refusing the request of the appellant. The answer to the fourth interrogatory is given in a negative and vague manner, but it manifestly appears therefrom that the jury intended to find that the decedent might have seen the approaching train at all points but one, between the Holmes House and a point southeast of the track. Besides, such answer is modified and controlled by the answer to the fifth interrogatory. We

The State v. Hutzell.

think the appellant was not injured by such refusal. If the answer to the fourth interrogatory had been full, certain and specific, it would not have controlled the general verdict. *McElfresh v. Guard*, 32 Ind. 408. Hence, there was no error.

We have thus examined all the alleged errors, and have not found any that justifies the reversal of the judgment.

The judgment is affirmed, with costs.

THE STATE v. HUTZELL.

CRIMINAL LAW.—*Indictment.—Duplicity.—Sale of Intoxicating Liquor on Sunday.*—In an indictment for selling, on Sunday, December 6th, 1874, one gill of intoxicating liquor, to be drank on the premises where sold, an averment that the defendant had not a license or permit authorizing him so to do did not render the indictment objectionable for duplicity, but such averment was merely surplusage.

From the Allen Criminal Circuit Court.

C. A. Buskirk, Attorney General, and S. M. Hench, Prosecuting Attorney, for the State.

BIDDLE, J.—The indictment in this case charges, “that, at the county of Allen, in the State of Indiana, on Sunday, the 6th day of December, 1874, one Daniel Hutzell, then and there being, did unlawfully sell one gill of intoxicating liquor to Henry Fry, to be drank on the premises where sold, for which he, the said Daniel Hutzell, received the sum of ten cents, and he, the said Daniel Hutzell, not having then and there a license nor permit authorizing him so to do; contrary,” etc.

On motion, the indictment was quashed. The State appealed. The appellee has not filed any brief, and we are at a loss to know what could be said in his behalf. We are

Lichtenfels v. The State.

informed, however, by the appellant's brief, that the indictment was quashed for duplicity. If so, we think the court erred. Duplicity in an indictment consists in charging two or more offences in one count. There is but one offence charged in this indictment—one sale, a sale which a permit will not protect; it was therefore useless to aver that the appellee had no permit, and the averment may be held as surplusage. It is, indeed, not only surplusage, but extremely empty, for it avers that he had not that which everybody must know by the law he could not get, namely, a permit to sell intoxicating liquor on Sunday.

The judgment is reversed, with costs, cause remanded, with instructions to overrule the motion to quash the indictment, and for further proceedings.

LICHTENFELS v. THE STATE.

SUPREME COURT.—*Appeal in Criminal Case.—Appeal Taken too Late.*—

Where, on appeal from a judgment of conviction rendered by a circuit court, in a prosecution for selling intoxicating liquor to a person in the habit of getting intoxicated, the transcript was not filed in the Supreme Court within one year and thirty days after the rendition of the judgment, the appeal was dismissed on motion.

From the Wayne Circuit Court.

S. A. Forkner, for appellant.

C. A. Buskirk, Attorney General, and *D. W. Comstock*, Prosecuting Attorney, for the State.

BUSKIRK, J.—The appellant was convicted of selling intoxicating liquor to a person who was in the habit of becoming intoxicated, and, by this appeal, seeks a reversal of the judgment below for several alleged errors.

The appellee moves to dismiss the appeal, for the reason

Eagan v. The State.

that it was taken more than a year after the rendition of the judgment. The judgment was rendered at the April term, 1874. The transcript was filed in this court on the 15th day of June, 1876. This was too late. The appeal must be taken within one year after the judgment is rendered, and the transcript must be filed within thirty days after the appeal is taken. The transcript must have been filed within one year and thirty days after the rendition of the judgment. This was not done.

The appeal is dismissed, at costs of the appellant.

EAGAN v. THE STATE.

CRIMINAL LAW.—*Duplicity.*—*Giving Away Intoxicating Liquor.*—Prosecution by affidavit and information alleging that the defendant, at, etc., on, etc., did “sell, barter and give away intoxicating liquor to,” etc., a person in the habit of getting intoxicated, but not alleging what, if anything, was paid for the liquor, or what, if anything, was exchanged for it.

Held, on motion to quash the affidavit, that the words charging a sale and a barter should be regarded as surplusage, and there was no duplicity.

INTOXICATING LIQUOR.—*Whiskey.*—*Judicial Knowledge.*—Courts and juries take notice that whiskey is an intoxicating liquor, without proof of the fact; and it is not error for the court in a proper case to charge the jury that proof of a sale of whiskey is proof of a sale of intoxicating liquor.

From the Jennings Circuit Court.

D. Overmyer, for appellant.

C. A. Buskirk, Attorney General, and *J. O. Cravens*, Prosecuting Attorney, for the State.

BIDDLE, J.—Prosecution by affidavit and information against the appellant for giving intoxicating liquor to John Derringer, a person being in the habit of getting intoxicated. Motion to quash the affidavit overruled. Plea, not guilty. Jury trial. Verdict, guilty. Fine, ten dollars. Motion for

Eagan v. The State.

a new trial overruled. Judgment. The appellant reserved exceptions to each ruling, and appeals to this court.

The affidavit and information charge that the appellant at, etc., on, etc., did "sell, barter and give away intoxicating liquor to," etc. It is urged upon us that the affidavit is bad for duplicity, because it charges a selling, a bartering and a giving. It does not charge a selling, because it does not allege what, if anything, was paid for the liquor; nor a bartering, because it does not allege what, if anything, was exchanged for it. These words may be held as surplusage, and still leave the charge of giving well alleged. The affidavit is good. *Divine v. The State*, 4 Ind. 240; *Shafer v. The State*, 26 Ind. 191.

It is next urged that the court erred in instructing the jury as follows:

"Whiskey is intoxicating liquor, and when a sale of whiskey is proven, a sale of intoxicating liquor is shown."

There is no error in this instruction. Courts and juries must take notice that whiskey is an intoxicating liquor, without proof of the fact. It belongs to that class of facts which are judicially known. That whiskey will intoxicate, is as well known as that fire will burn, or water will drown, or any of those common and familiar phenomena which are uniform and universal. To be required to prove them at each judicial trial, would be a frivolous waste of time. Besides, the authorities have settled the question over and over again. In the case of *Commonwealth v. Peckham*, 2 Gray, 514, which was a prosecution for unlawfully selling gin, the court said:

"Now everybody, who knows what gin is, knows not only that it is a liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor, without evidence that it was not a solid substance, as that they could not find that it was intoxicating, without testimony to show it to be so. No juror can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin is proof that

Dawkins v. Kions.

he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin."

The question is also settled by authority in this State, in the case of *Carmon v. The State*, 18 Ind. 450, wherein PERKINS, J., in delivering the opinion of the court, says:

"The State prosecuted and committed Carmon upon a charge of selling 'whiskey' to a minor. It is contended that an affidavit or information simply charging a sale of whiskey, without averring that whiskey is an intoxicating liquor, is bad. We do not think so. The court, from its general knowledge, can judicially say that whiskey is an intoxicating liquor; and the jury might so find upon their general knowledge. * * * If the defendant could prove, on the trial, that the article he sold was not intoxicating, he would disprove that it was whiskey."

The appellant finally insists that the evidence does not sustain the verdict. We think it does, fully and fairly, beyond all reasonable doubt. His own testimony is strong evidence against him.

The judgment is affirmed, with costs.

DAWKINS v. KIONS.

53	164
155	367

VENDOR AND PURCHASER.—Recording of Deeds.—Subsequent Purchaser.—Subrogation.—In September, 1856, A. sold and conveyed by warranty deed certain land to B. for a valuable consideration, and said deed was not recorded till November, 1861. B. conveyed, January 23d, 1869, to C., who was not to pay the purchase-money unless he could recover possession of the land by suit. His deed was recorded April 19th, 1869. In March, 1860, the sheriff sold and conveyed said land to D., under a decree of foreclosure and judgment, to which B. was not a party, against A., rendered in 1857 and assigned to D., on a mortgage which was prior in date and lien to said deed of A. to B.; and in April, 1860, A. conveyed said land by quitclaim to D., who, at the time he received said conveyances, had neither actual nor constructive notice of said con-

Dawkins v. Kions.

veyance to B. In May, 1862, in an action brought by A. against D., said foreclosure sale and said quitclaim were confirmed, and it was decreed that D. was vested with the legal title to said land, and held it in trust for A., and that A. should pay D. a certain sum before the 1st of January, 1864, upon which the title in fee to said land should be vested in A., discharged of all claims of D., who should then convey to A., or his assigns, by quitclaim, and in default thereof the decree should operate as such conveyance. Afterwards, in March, 1863, E. purchased said decree of D., and D., upon written request of A., entered on the order book following said decree, conveyed said land by quitclaim deed to E., upon payment by him of a certain sum to D., who acknowledged said payment in writing on the order book after said decree, and A. conveyed said land to E. by quitclaim deed, said deeds to E. being duly recorded within ninety days after their date. E., for a valuable consideration, conveyed said land to F. by quitclaim deed, dated July 3d, 1869, and recorded August 17th, 1869. Neither E. nor F., at the time of purchase, had actual notice of the conveyance to B. *Held*, in an action by C. against F. to recover possession of said land, that whether the conveyance to D. be regarded as giving him a title in fee simple or as operating as a mortgage, the conveyance of A. to B. was void as to D. and his grantees.

Held, also, that said decree in said action of A. against D., purchased by E., would, if necessary, be regarded as in force for the protection of E. and his grantees.

From the White Circuit Court.

J. H. Matlock, for appellant.

G. O. Behm, J. Park and A. O. Behm, for appellee.

DOWNEY, C. J.—This was an action by the appellant against the appellee. The complaint is in three paragraphs. The first is in the usual form for the recovery of real property; the second is for the rents and profits of the real estate; and the third is to quiet title to the same real estate. The answer to each paragraph was by a general denial. The trial was by the court, and, by request, there was a special finding of the facts and conclusions of law, favorable to the defendant. The plaintiff excepted to the conclusions of law, and has assigned such conclusions of law as error, in this court. The special finding and conclusions of law are as follows:

“At the request of defendant’s counsel, made at the time of the submission of the above entitled cause for trial, the

Dawkins v. Kions.

court now renders a special finding of facts and conclusions of law in said cause, viz.: It is found that, on and before the 30th day of September, 1856, John Kions was the owner in fee simple of the lands described in the complaint, to wit, the southwest quarter of the southeast quarter of section nine, township twenty-five (25) north, of range four (4) west, lying in White county, and State of Indiana; that both plaintiff and defendant claim title to said land through said John Kions; that on the 30th day of September, 1856, said John Kions sold and conveyed said land, by deed of general warranty, and for a valuable consideration, fully paid, to Milam A. Kions, which deed was recorded in said county, November 23d, 1861; that Milam A. Kions and wife conveyed said lands by deed to plaintiff, Matthew J. Dawkins, January 23d, 1869, which deed was recorded April 19th, 1869; that the defendant has been in the use and occupation of said premises for — years, and the same is of the value of four hundred and fifty dollars.

“On the 24th day of March, 1857, Hiram W. Chase recovered a decree of foreclosure and judgment against said John Kions for eight thousand nine hundred and seventy dollars.

“The above lands were embraced in said foreclosure, and included in the mortgage. An order of sale was thereafter issued on said judgment and decree of sale, and, on the 30th day of March, 1860, the sheriff of White county sold said lands, with other lands, and duly conveyed the same to Richard Sibbitt; said Sibbitt having before that time taken an assignment of said Chase judgment and decree to himself. Said Milam A. Kions was not made a party to said Chase foreclosure suit.

“On the 13th day of April, 1860, John Kions and wife conveyed the lands in dispute, by quitclaim deed, to said Richard Sibbitt; that on the 6th day of March, 1862, John Kions filed his complaint in the White Circuit Court against said Richard Sibbitt, alleging, among other things, that by virtue of said quitclaim deed and said sheriff's sale on the Chase foreclosure, and by virtue of an agreement between

Dawkins v. Kions.

said John Kions and said Sibbitt, said Sibbitt took and held the legal title to said lands, as well as certain other lands, in trust for John Kions.

“And thereupon such proceedings were had, that the venue of said cause was changed to the Tippecanoe Circuit Court. Thereafter said Sibbitt filed his answer and cross-complaint, and, the issues being joined, the cause was submitted for trial, and upon the final hearing the judge rendered the following judgment and decree :

“‘It is therefore considered, adjudged and decreed by the court that, by the sheriff’s sale made by the sheriff of White county, in the State of Indiana, on the 30th day of March, 1860, under the order of sale issued on a decree of foreclosure in favor of Hiram W. Chase against John Kions, in the White Circuit Court, as set forth in the complaint, and by deed of conveyance by said plaintiff and wife to said defendant, on the 13th day of April, 1860, which sale and deed of conveyance are hereby confirmed and adjudged valid and effectual, the said defendant became and was vested with the title in and to’—here the decree embraces a large body of lands, including the lands described in said complaint—‘and the court further orders, adjudges and decrees that the following described lands’—then follow many tracts, including those described in the complaint—‘are subject to said trust in favor of said plaintiff and found by the jury in their verdict above set forth; and the court orders, adjudges and decrees that the said plaintiff pay to said defendant the sum of seven thousand dollars, so found by the jury in said verdict, with the interest thereon from this date, on or before the 1st day of January, 1864, and upon such payment being made, that the title in fee in and to said lands so adjudged to be held in trust as aforesaid be vested in said plaintiff, freed and discharged from all claim, interest and estate of the said defendant in or to the same. And it is further ordered, adjudged and decreed that upon the payment of said sum of seven thousand dollars and interest thereon, said defendant shall execute to said plain-

Dawkins v. Kions.

tiff, or his assigns, a quitclaim deed for the lands so held in trust as aforesaid, and, on default thereof, this decree, upon such payment, shall operate as such conveyance, and a certified copy thereof, and of entry of satisfaction, may be recorded in the recorder's office of the said county of White as such conveyance.'

"The decree then recites that the parties came into open court and consented to the decree, and every part thereof, and waived and released all errors.

"After the rendition of the foregoing judgment and decree, an agreement was made between Spear, Case & Co. and Mrs. Kions and said Joseph Kions, the wife and son of John Kions, and with said John Kions, that Spear, Case & Co., who desired to purchase said lands, should purchase of said Sibbitt said judgment and decree rendered in said case of *John Kions v. Richard Sibbitt*, and pay off the other judgment liens against said lands, and take the lands, said John Kions agreeing to convey said lands to them, said Spear, Case & Co. Accordingly, they did purchase said Sibbitt decree, paying said Sibbitt the sum of ——— dollars, and by the written request of said John Kions, said Sibbitt deeded said lands by quitclaim deed to said Spear, Case & Co. The acknowledgment of said Sibbitt of the payment of the money to him by said Spear, Case & Co. and the request of said Kions that said Sibbitt would convey said lands to said Spear, Case & Co. are in writing and entered on the order book of the Tippecanoe Circuit Court and immediately under and following said decree and judgment, and read in these words, viz.:

"Received of James Spear, Reed Case and James P. Dugan, seven thousand three hundred and sixty-eight dollars and sixty-seven cents, in full of principal and interest of this decree; and I agree to make a quitclaim deed to them, pursuant to the below written request, for the lands in said decree set forth, which I was decreed to hold in trust.

"March 18th, 1863.

RICHARD SIBBITT.

"By CHASE & WILSTACH, his att'ys.'

Dawkins v. Kions.

“‘I request Richard Sibbitt to make a quitclaim deed for the lands held by him in trust for me, to James Spear, Reed Case and James P. Dugan.

“‘March 18th, 1863.

JOHN KIONS.’

“The foregoing decree was rendered May 1st, 1862. There was never any written assignment of said decree and judgment by Richard Sibbitt to said Spear, Case & Co. On the 23d of March, 1863, pursuant to the request of said John Kions, said Richard Sibbitt quitclaimed said lands to Spear, Case & Co. On the 18th day of March, 1863, John Kions and wife conveyed said lands to Spear, Case & Co. by quitclaim. The deeds from Sibbitt to Spear, Case & Co. and from Kions and wife to them were duly recorded, and within the ninety days after their respective dates.

“On the 3d day of July, 1869, Spear, Case & Co. conveyed, by quitclaim deed, the land in dispute, to the defendant Joseph H. Kions, deed duly recorded August 17th, 1869. Richard Sibbitt had neither actual nor constructive notice of the deeds of Milam A. Kions, at the time he took his conveyance, in 1860.

“On the 23d day of March, 1863, said Spear, Case & Co. gave Mrs. Harriet Kions, wife of said John, a title-bond for the lands in dispute. Thereafter, Joseph H. Kions paid out the purchase-money reserved by said bond, and by an arrangement between him, his mother, said Harriet, and Spear, Case & Co., they, said Spear, Case & Co., conveyed by quitclaim said lands to defendant, Joseph H. Kions, the date of which deed, July 3d, 1869, is hereinbefore found.

“At the time Dawkins purchased said lands and took the conveyance from Milam A. Kions, the defendant, Joseph H. Kions, was in the possession of the same under said title-bond and claiming title, which was known to said Dawkins. Neither Spear, Case & Co. nor Joseph H. Kions had any *actual* knowledge of the conveyance of John Kions to Milam A. Kions, though at the time each purchased, they each had constructive notice thereof.

“Joseph H. Kions paid the full value of the lands in dis-

Dawkins v. Kions.

pute, without any actual knowledge of the claim of Milam. Some time in 1859 or 1860, Milam A. Kions left the possession of said lands, and since then the possession has been in John Kions and his grantees. Some time in 1859 or 1860, Milam A. Kions verbally agreed with his father, John Kions, that if he, said John, would pay him, said Milam, for said lands, he would give up his title; but nothing was ever paid him, and he never reconveyed said lands nor gave up his title.

“When Dawkins purchased of Milam A. Kions, it was agreed between them that unless he could put said Dawkins in possession, that is, unless said Dawkins could recover possession by suit, he was to be relieved from the payment of the purchase-money.

“Said Spear, Case & Co. have never been repaid the money, nor any part thereof, which they paid Richard Sibbitt for said decree, by said John Kions nor by any one else.

“From the foregoing facts I find the following conclusions of law:

“1. That Spear, Case & Co. derived their title through Richard Sibbitt, and also John Kions.

“2. That the titles conveyed by John Kions and by the sheriff of White county, in 1860, to Richard Sibbitt, were good as against said Milam A. Kions, except such right as he may have to redeem.

“3. That the Sibbitt decree, purchased by Spear, Case & Co., is regarded in equity as in force for their protection and for the protection of their grantee.

“4. That the title of Joseph H. Kions is good and valid as against Milam A. Kions or the plaintiff, and that he should recover in this action.

“5. I therefore find for the defendant, on the facts and conclusions of law hereinbefore set forth.

“DAVID P. VINTON.”

The fact does not appear in the special finding, but is admitted in the brief of counsel for appellant, that the mortgage on which the judgment of Chase was rendered was

Dawkins v. Kions.

prior in date and in lien to the deed from John to Milam A. Kions. It is apparent that the plaintiff, Dawkins, is a mere adventurer, having purchased under an agreement that he was not to pay if he could not recover the lands. While he occupies this position, he claims that when payment was made of the amount of the decree by Spear, Case & Co., the title to the lands vested in John Kions, who would be estopped to claim the same as against Milam A. Kions, to whom he had previously conveyed, and thus the title of Milam A. Kions and the plaintiff, his grantee, became valid and effective as against the defendant, Joseph H. Kions. We do not forget that there is such a law of estoppel as mentioned by counsel; but, in our judgment, it is not applicable here. It seems to us that Sibbitt must, under the facts found, be regarded as an innocent purchaser for value, and as entitled to the land in preference to Milam A. Kions or his grantee, the plaintiff. The deed from John Kions to Milam A. Kions was executed on the 30th day of September, 1856, but was not recorded until the 23d day of November, 1861. On the 30th day of March, 1860, the land was sold and conveyed by the sheriff to Sibbitt; and on the 13th day of April, 1860, John Kions also conveyed the land to Sibbitt. It is expressly found by the court that Sibbitt had neither actual nor constructive notice of the unrecorded deed to Milam A. Kions, at the time he took his conveyances, in 1860. Under these circumstances, the deed from John to Milam A. Kions is void as to Sibbitt and his grantees, by statute, 1 G. & H. 260, sec. 16, and it is not material whether the conveyance was in fact a deed creating a fee simple or only a mortgage. The same rule applies to either and both. Sibbitt having been a purchaser in good faith and for a valuable consideration, it matters not whether those claiming under and through him had notice of the deed of Milam A. Kions or not.

We think there is no reasonable ground on which to doubt the correctness of the third conclusion of law of the court. If the title acquired by Spear, Case & Co. is valid,

Cleavenger *et al.* v. Beath.

the right to resort to the decree for protection amounts to nothing. If their title should prove defective, we do not now perceive any reason why they may not be subrogated to the rights of Sibbitt under the decree.

In our judgment, the court below committed no error in its legal conclusions.

The judgment is affirmed, with costs.

CLEAVENGER ET AL. v. BEATH.

MORTGAGE.—*Defective Description of Note.*—In a suit on a promissory note and to foreclose a mortgage on real estate given to secure said note, the note and mortgage being filed with the complaint and made part thereof, the note so filed, which was read in evidence on the trial, did not correspond with the description of the note in the mortgage.

Held, that the note so pleaded and proved controlled and cured the defective description in the mortgage.

From the Blackford Circuit Court.

J. T. Wells and *W. H. Carroll*, for appellants.

W. A. Bonham and *J. Cantwell*, for appellee.

PETTIT, J.—This suit was brought by the appellee, John Beath, against the appellants, John W. Cleavenger, Fanny A. Cleavenger, his wife, and Charles A. Clauser, to foreclose a mortgage on real estate, which the two former, Cleavenger and wife, had given to Beath, to secure a note given by John W. Cleavenger to Beath, Clauser having purchased the real estate of Cleavenger and wife, after their mortgage to Beath was duly recorded. There was a joint answer of general denial. Trial by the court, finding for the plaintiff for the amount of the note and the foreclosure of the mortgage, sale, etc. The note and mortgage are made parts of the complaint and filed with it.

In the mortgage, the note secured by it is described thus:

Meeker et al. v. The Board of Commissioners of Fountain County et al.

“Of two hundred dollars made payable to John Beath and due one year after date.”

The note filed with the complaint and made a part of it is as follows:

“\$200.00

FEBRUARY 5th, 1873.

“One year after date, I promise to pay to the order of John Beath two hundred dollars, value received, without any relief from valuation and [or] appraisement laws of the State of Indiana, with interest at ten per cent. per annum from date until paid. If this note be collected by suit, the judgment shall include the reasonable fee of plaintiff’s attorney.

JOHN CLEAVENGER.”

The only question raised or made, upon which the judgment is sought to be reversed, is that the note described in the mortgage and the one filed with the complaint and read in evidence were different.

We hold that there was no error in this. This ruling is fully sustained by *Howe v. Dibble*, 45 Ind. 120; *Dorsch v. Rosenthal*, 39 Ind. 209.

The judgment is affirmed, at the costs of the appellants, with five per cent. damages.

**MEEKER ET AL. v. THE BOARD OF COMMISSIONERS OF
FOUNTAIN COUNTY ET AL.**

From the Fountain Circuit Court.

W. C. Wilson and *J. H. Adams*, for appellants.

S. F. Wood, *H. H. Dochterman* and *Nebeker & Cambern*, for appellees.

DOWNEY, C. J.—The question necessary to be decided in this case is the same as that in the case between the same parties, *ante*, p. 31. For the reason given in the opinion in that case, the judgment in this case must be affirmed.

The judgment is affirmed, with costs.

COX v. HARVEY.

NEW TRIAL.—*Complaint for New Trial.*—*Newly-Discovered Evidence.*—*Cumulative Evidence.*—Where, on the trial of an action, admissions of a party tending to show his liability in such action have been proved, proof of other admissions made by him having the same tendency is cumulative evidence, and the discovery of such evidence after the term at which the verdict or decision was rendered cannot support a complaint for a new trial.

SAME.—*Surprise.*—*Diligence.*—*Attorney.*—Where a party to an action, being sick, was absent from the trial thereof, knowing the issues, and not having asked a continuance, but having entrusted the management of his cause to his attorney, and, in a complaint for a new trial, on the ground that he was surprised by the evidence of the adverse party, alleged that he was not informed of such evidence till after the term, but did not show that, by the use of diligence, his attorney could not have informed him;

Held, that the complaint was bad for its failure to show reasonable diligence.

From the Hamilton Circuit Court.

J. W. Evans and *R. R. Stephenson*, for appellant.

J. O'Brien and *R. Graham*, for appellee.

DOWNEY, C. J.—This was a complaint for a new trial by the appellant against the appellee. To it a demurrer was sustained by the court, and this ruling is the error assigned. The complaint alleges that an action was instituted by the appellant against the appellee and Abner Atkinson and Thomas Stout, on a promissory note, alleged to have been executed by the defendants therein in their firm name of Atkinson & Co.; that Atkinson and Stout did not appear, not having been served with process; that Harvey appeared, and under oath denied the execution of the note; that upon trial by the court, there was a finding for the defendant and judgment thereon for costs in his favor. The evidence given in the cause is then set forth *in extenso*, and as grounds for a new trial, the plaintiff relies upon newly-discovered evidence, and that he was surprised by the evidence introduced by the defendant on the trial of the cause.

Cox v. Harvey.

A complaint can be filed for a new trial only for causes discovered after the term at which the verdict or decision was rendered. 2 G. & H. 215, sec. 356.

As to the ground stated relating to the newly-discovered evidence, it is urged by counsel for appellee that the complaint does not show that such new evidence was discovered after the term of court when the decision of the cause was had. We think counsel are mistaken in this. The complaint states "that since the adjournment of the November term, 1873, of this court, at which the trial of this cause was had, he has discovered," etc.

Again, it is urged that the alleged new evidence is only cumulative. We think this position is well taken. On the trial, admissions of the defendant were given in evidence by the plaintiff, tending to show that he was liable on the note as one of the firm. The newly-discovered evidence consists of other admissions made by the defendant having the same tendency. This is cumulative evidence. The discovery of such evidence is no ground for granting a new trial. Buskirk Prac. 241, 242, and cases cited.

The plaintiff was at home, sick, and not at the trial. His deposition was taken and used. He alleges, as to the surprise, that he was not informed as to how the witnesses against him had testified, until after the close of the term. It does not appear that, with the use of any diligence, his counsel could not have informed him, and for this reason we think this cause for a new trial cannot be held sufficient. The want of reasonable diligence of counsel is the same as want of reasonable diligence of the client. He was informed of the issue that had been made in the cause; he did not ask to have the cause continued, but entrusted the management of the trial to his counsel; and he must abide by the consequences of their neglect, if any there was. We think the demurrer to the complaint was properly sustained.

The judgment is affirmed, with costs.

Woodward v. Begue.

WOODWARD v. BEGUE.

PROMISSORY NOTE.—Consideration.—Special Finding.—In an action by an assignee on a promissory note not payable in bank, executed by A. and B., it was answered by B. and found by the jury in answer to interrogatories, that it was agreed by the makers and payee, at the time of the execution of the note, that it should not be valid or binding as against B., until after he should receive a paid up policy of insurance on the life of A. for a certain sum, this being the only consideration for the signing of the note by B., and that no such policy was ever delivered or tendered to him.

Held, that this special finding was not inconsistent with a general verdict in favor of B.

PRACTICE.—Venire De Novo.—Where a verdict is certain, responsive to the issues, and decides the whole case, a motion for a *venire de novo* will not be sustained.

INSTRUCTIONS TO JURY.—Issue not Involved in Verdict.—Where one of several defences put in issue in an action was fraud, but the jury specially found that there was no fraud, and evidently founded their verdict for the defendant on another ground of defence, there was no available error in the refusal of the court to give to the jury, at the request of the plaintiff, an instruction in relation to fraud.

PLEADING.—General Denial.—Estoppel.—Where, in an action brought by an assignee, on a note not payable in bank, executed by two persons, one of the makers answered fraud and want and failure of consideration, and there was a reply of the general denial only, the defendant pleading such answer could not be debarred from setting up such defences by the fact that, after the execution of said note, he being surety thereon, he used and appropriated another note received by him or his principal, in consideration of said note sued on, by indorsing and delivering said other note to a bank, in payment of another note of said principal held by the bank, on which said surety was indorser, and thus carried out the original intention of the parties to the note in suit, and availed himself of all its advantages to him.

From the Allen Common Pleas.

W. H. Coombs and *W. H. H. Miller*, for appellant.

R. C. Bell and *W. G. Colerick*, for appellee.

DOWNEY, C. J.—Suit by the appellant against the appellee on a promissory note for one thousand dollars, executed by the appellee and one Comparet to one Story, and by him indorsed to the appellant. Comparet made default. Begue answered:

Woodward v. Begue.

1. A general denial.
2. That his signature to the note was obtained by fraud, setting out the facts.
3. That the note was given in consideration that Comparet would immediately procure and deliver to the defendant Begue a paid up policy of insurance on the life of him, the said Comparet, in the sum of three thousand dollars, and for no other consideration whatever, which was known to the payee of the note; that the policy was never procured and delivered to him, of which fact Story was, at the time, informed.
4. That the said note was given without any consideration whatever.

The general denial was afterwards withdrawn, and a reply in denial of the second, third and fourth paragraphs of the answer was filed. A trial by jury resulted in a general verdict in favor of the defendant, and numerous special findings in answer to interrogatories.

The plaintiff moved successively for a new trial, for a *venire de novo*, and for judgment in his favor on the special findings; all of which motions were overruled, and proper exceptions taken. Final judgment was then rendered for the defendant. The errors assigned call in question the correctness of the action of the court in overruling the said several motions.

1. The answers to the interrogatories are too numerous and too long to be set out in this opinion. The jury found that it was agreed by and between Comparet, Story and Begue, at and before the time the note sued on was signed, that the same should not be valid or binding as against Begue, until after Begue should receive the paid up policy of insurance on the life of Comparet for the sum of three thousand dollars; that this was the sole and only consideration which Begue received or was to receive for signing the note; and that no such policy was ever delivered or tendered him. These facts fully sustained the third paragraph of the

Woodward v. Begue.

answer, and are consistent with the general verdict. In our opinion, there was no such inconsistency of the special findings with the general verdict as would have warranted the court in rendering judgment for the plaintiff, notwithstanding the general verdict against him. Story was a party to this agreement. Hence, the doctrine in *Deardorff v. Foreman*, 24 Ind. 481, and cases following it, can have no application here.

2. There is no ground upon which the motion for a *venire de novo* could have been sustained. The verdict was certain, was responsive to the issues, and decided the whole case. *Bosseker v. Cramer*, 18 Ind. 44.

3. The only grounds insisted upon in the brief of counsel under the assignment of error relating to the overruling of the motion for a new trial are the insufficiency of the evidence to sustain the verdict, and the refusal of the court to give the seventh, thirteenth, seventeenth and eighteenth instructions asked by the plaintiff. Counsel for appellant argue the case mainly on the ground of fraud. In speaking of the transaction, they say, "that fraud was perpetrated, or at least attempted, by this arrangement, we have no doubt; but surely Story was not the guilty party," etc. Conceding that he was not (and we ought to say in this connection that the jury found, in answer to one of the questions put to them, that he was not), still it must be borne in mind that proof of fraud was not necessary in order to make out a defence to the action. There were other defences pleaded. The note was not governed by the law merchant. The want or failure of consideration might be inquired into, notwithstanding the action was brought by an indorsee. The circumstances attending the execution of the note were known to Story. We do not feel at liberty to reverse the judgment for want of evidence. We think the verdict is not unsupported by the evidence. It is probably in accordance with the justice of the case also.

Counsel for the appellant say: "The charges of the court, so far as given, are strongly in our favor, and, as we

think, the law was correctly given to the jury ; but the jury wholly disregarded the instructions of the court, and found their verdict contrary thereto." The court instructed the jury at great length, at the request of the plaintiff, and also at the request of the defendant. Of the charges now objected to by counsel, only the eleventh and seventeenth were mentioned in the motion for a new trial.

The eleventh charge asked by the plaintiff related to the subject of fraud. It is evident from the whole record that the jury did not find their verdict against the plaintiff on the ground of fraud ; for, in one of their answers to questions, they expressly negative the existence of any fraud on the part of Story. This being the fact, the refusal of that charge, if there was no good reason for such refusal, would not authorize us to reverse the judgment.

The evidence tends to show that the note sued upon and another for the same amount were given by Comparet, the defendant Begue being his surety on them, in consideration of the transfer by Story to Comparet of two notes of like amount held by him on one Stoner, and that the Stoner notes were afterwards transferred to the Fort Wayne National Bank, in payment of paper of Comparet, on which Begue was indorser, held by the bank. The seventeenth charge asked by the plaintiff was as follows :

"If you find from the evidence that the defendant Begue, after the execution of the note sued on, used and appropriated the notes of John Stoner, received by himself or Comparet in consideration of it, by endorsing and delivering the same to the bank, in payment of the debt of himself and Comparet to the bank, and thus carried out the original intention of himself and both the other parties to the transaction, and availed himself of all its advantages to him, he will be debarred from setting up any defence to this note on the ground of fraud or want of consideration."

The only reply filed by the plaintiff to the answer of the defendant was the general denial. As this instruction sought to have the court state to the jury that Begue might

Woodward v. Begue.

be debarred from setting up the defences alleged by him in consequence of something which he did after the execution of the note, it becomes a question, we think, whether that after-occurrence can be shown under the issues formed by the general denial, or whether it should not have been specially replied. The statutory rule is, that "under a mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove." The circumstance relied upon in the instruction is in the nature of an estoppel by matter occurring *ex post facto*. It did not tend to negative the allegations of defence made by the defendant. We think, for this reason, the seventeenth instruction asked was properly refused.

The judgment is affirmed, with costs.

WORDEN, J., was absent.

BIDDLE, J., dissenting, delivered the following opinion:

Suit on a promissory note, made by David F. Comparet and the appellee, to James Story, for one thousand dollars, and endorsed by Story to the appellant. Begue alone appeared, and pleaded:

1. That the appellant had no interest in the note, but brought the suit as the agent of Story.
2. Fraud, specially alleged, praying for affirmative relief.
3. That the consideration of the note was a certain paid up life policy, which was never delivered to him.
4. That the note was given without consideration.

A demurrer was sustained to the first paragraph of answer, but there is no question made upon this ruling. Replies were filed, and issues formed on the second, third and fourth paragraphs of answer, a jury trial had, and a general verdict rendered for defendant, with special findings in answer to interrogatories. A motion for a new trial, a motion for a *venire de novo*, and a motion for judgment for appellant on the special findings were made in order, and overruled. Exceptions and appeal.

The answers to the special interrogatories find as follows:

1. That, at the time the note was executed, Begue was indebted to the Fort Wayne National Bank, as the endorser of Comparet, upon four notes of five hundred dollars each.

2. That at the time the note sued on was executed, another similar note was executed by Comparet and Begue, and both delivered to Story, the payee.

3. Answer, no evidence.

4. That there was no combination between Comparet and Story to cheat Begue by obtaining his signature to the note sued on.

5. That Story practised no fraud on Begue, to obtain his signature.

6. That Story received no other consideration for the two notes on Stoner, each for one thousand dollars, than the two notes of Comparet and Begue, one of which is the note sued on.

7. That Story derived no benefit from the Stoner notes, assigned and delivered by him, other than the two notes of Comparet and Begue.

8. That it was the understanding of all the parties, and the agreement of Comparet and Begue, that the Stoner notes were to be used for the payment of Comparet's notes in bank, upon which Begue was security.

9. That it was the arrangement between Begue and the bank, that the Stoner notes were to be left in the bank, to be applied to Comparet's notes for two thousand dollars, endorsed by Begue, in case Stoner said they were all right.

10. That Stoner's notes were afterwards, about January 11th, 1868, endorsed by Begue to the bank, and applied to the payment of Comparet's notes, endorsed by Begue, with Begue's consent.

11. That Stoner paid his notes, thus endorsed, to the bank.

12. That Story gave the two Stoner notes as the consideration of the two notes made by Comparet and Begue, in

Woodward v. Begue.

good faith, without fraud, or any knowledge of fraud on the part of Comparet.

13. That the promise of Comparet to Begue to procure for him a life policy was made in good faith.

The interrogatories upon which the above findings were had were asked by the appellant. The appellee asked the interrogatories upon which the following findings were had:

1. That Story was willing that Comparet should use the Stoner notes to pay off his, Comparet's, debt to the bank.

2. That the note sued on was delivered to Story upon the condition that it should not be binding against Begue, unless the policy on Comparet's life was delivered to Begue, to which Story consented.

3. That no such policy was ever delivered or tendered to Begue.

4. That the Stoner notes were delivered to Comparet by Story, before the note sued on was signed.

5. That Comparet took the Stoner notes to the bank on the 10th day of December, 1867.

6. That the note sued upon was signed by Begue for the sole consideration that he should receive a policy on the life of Comparet for three thousand dollars.

7. That it was agreed between Comparet, Story and Begue, that the note sued on should not be binding on Begue until he had received the policy on the life of Comparet.

8. That Begue did not receive, and was not to receive, any other consideration for signing the note sued on than the policy on the life of Comparet.

9. That the two Stoner notes were delivered to Comparet by Story, to be used in payment of Comparet's debts to the bank, on which Begue was surety.

10. That the two Stoner notes were placed in the bank by Comparet.

11. The bank, on receipt of the Stoner notes, on the 11th day of January, 1868, in payment of Comparet's debt, gave up to Comparet his notes thus paid.

Woodward v. Begue.

12. The arrangement thus to pay Comparet's debt with the Stoner notes was made by Comparet with the bank.

13. That Begue endorsed the Stoner notes to the bank for the purpose of strengthening them, and not as the owner thereof.

14. The first time that Begue ever saw the face of the Stoner notes was on the 11th day of January, 1868.

The note sued on and the endorsement, which show the right to be in the appellant, were admitted by the pleadings. The answers to the interrogatories find that the consideration of the note, and of one similar to it for the same amount, was the notes on Stoner of equal amounts. That the Stoner notes were thus obtained for the purpose of paying Comparet's debt to the bank, upon which Begue was security. That Begue endorsed the Stoner notes to the bank for that purpose. That the bank received them in payment of Comparet's notes, which were surrendered by the bank, thus relieving Begue from his suretyship, as well as Comparet from his debt. The consideration is thus shown. It has not failed, but was received and enjoyed by the makers by their own act, for their joint benefit, and there is no fraud. These facts negative all that is alleged in the several paragraphs of the answer, and, as it seems to me entitle the appellant to a judgment in his favor below, notwithstanding the general verdict.

Findings to interrogatories 2, 3, 6, 7 and 8, asked by appellee, do not militate against this view. It was not necessary that any consideration should move directly from Story to Begue, to sustain the note; provided there was a good consideration moving from Story to Comparet, because Begue signed the note as surety for Comparet. But there was a good consideration moving from Story to Begue, namely, the Stoner notes, the benefits of which went to Begue, by relieving him as the surety of Comparet on the bank debt. Nor does the agreement of Comparet, with the consent of Story, to furnish the life policy to Begue, upon which Begue's liability on the note was to depend, in the least affect the

 Blackwell v. Ketcham.

case. The policy to be given to Begue was no part of the consideration of the note between Story as payee and Comparet and Begue as makers; that was an arrangement solely between Comparet and Begue. True, Begue's liability to Story on the note depended on the delivery of the policy; and if Begue had stood by his rights under this condition, and not accepted the benefit of the Stoner notes, which formed the real consideration of the note sued on, he would have had a good defence to this action; but he cannot receive the benefit of the Stoner notes and then say the consideration of the note in suit has failed because Comparet never furnished him the policy. In my opinion, the judgment should be reversed.

 BLACKWELL v. KETCHAM.

PRINCIPAL AND AGENT.—*Special Agent.*—*Authority to Sign Note.*—Where a person authorizes another to sign the name of the former to a promissory note for a specified sum, the payee will be charged with knowledge of the extent of such authority, and the person conferring it cannot be bound for a larger sum.

From the Monroe Circuit Court.

P. C. Dunning, J. F. Pittman, J. W. Buskirk and H. C. Duncan, for appellant.

J. H. Loudon, R. W. Miers, C. F. McNutt and C. W. Henderson, for appellee.

DOWNEY, C. J.—This was an action by the appellee against the appellant and one Stultz on a promissory note, of which they were the makers and he the payee. It is alleged in the complaint, that by the agreement and authority of said Garrett J. Blackwell, his co-defendant, John W. Stultz, signed the name of said Blackwell to said note, and, by mistake, signed his name James ^{his} ~~X~~ G. Blackwell, when, mark.

53 184
137 238

Blackwell v. Ketcham.

in fact, he is generally known by the name of Garrett J. Blackwell. Process was not served on Stultz. Blackwell answered, under oath, denying the execution of the note. Upon a trial of this issue by a jury, there was a verdict for the plaintiff. The defendant moved the court for a new trial, for causes specified in his written motion; but the same was denied, and judgment was rendered on the verdict.

The errors assigned are:

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That the court improperly refused to grant the defendant a new trial.

The first alleged error is expressly waived by counsel for the appellant.

Under the second assignment, it is urged that the court erred in excluding certain testimony of one James Shields, offered by the defendant, in giving instruction number three of the general instructions by the court, and in giving a special instruction asked by the plaintiff. These questions need not all be considered. We pass over the first and go to that relating to the instructions. The third instruction is as follows:

“If you should find from the evidence that Blackwell authorized Stultz to put his name to a note with him for three hundred dollars or three hundred and fifty dollars, to be executed in consideration of an interest in certain mill property then belonging to one Helton, and you further find that the note in suit was given for said interest in said mill, and the same as was authorized to be given, except that it was for four hundred and seventy-five dollars, and larger than defendant authorized, yet, if you should find that the note was received by the payee without any knowledge that Stultz had exceeded his authority, and you further find that there was nothing in the transaction calculated to put him on inquiry or to indicate this want of authority, then Blackwell would be bound, notwithstanding he had not authorized it for the larger amount. Just so, if a man sign

Blackwell v. Ketcham.

his name to a note with another, leaving the amount blank, with authority to his co-obligor to fill it up with any amount not exceeding three hundred dollars, and the co-obligor fills it up with four hundred and seventy-five dollars; in such a case as this, the party who authorized the blank filled would be bound for the larger amount, if the payee to whom it was given acted in good faith and had no knowledge of the fraud that the one maker was practising on the other. The reason of this is, that where one of two innocent parties are to suffer, the one who gives the confidence and enables the fraud to be perpetrated should suffer, rather than the payee who had no knowledge of it."

The special instruction, of which complaint is made, is of the same import as that just set forth.

We are of the opinion that the court has applied to the case a rule of law not applicable to it. The case of one who signs paper in blank is essentially different from this. In that case, by signing the paper in blank, he impliedly confers upon the party to whom he intrusts it authority to fill up the blanks, so as to perfect the instrument, and this gives him power to fill the blank left for the insertion of the amount which is to be paid. *Holland v. Hatch*, 11 Ind. 497; *Spitler v. James*, 32 Ind. 202; *Gillaspie v. Kelley*, 41 Ind. 158.

The case under consideration is wholly different. It presents a question of easy solution, however. Blackwell authorized Stultz to sign his name to a note for three hundred dollars, or three hundred and fifty dollars. Stultz thus became the special agent of Blackwell to do this particular act. A special agent cannot bind his principal in a matter beyond or outside of the power conferred, and the party dealing with a special agent is bound to know the extent of his authority. *Pursley v. Morrison*, 7 Ind. 356; *Reitz v. Martin*, 12 Ind. 306; *Cruzan v. Smith*, 41 Ind. 288; *Berry v. Anderson*, 22 Ind. 36.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Winings v. Wood.

WININGS v. WOOD.

LANDLORD AND TENANT.—*Occupant Without Contract.—Suit by Owner for Rent.*—Where one occupies land, to which he claims title, but of which he is not the owner, without special contract, or, not being himself in actual possession, leases such land without the consent of the owner and receives rent therefor, the owner may recover the rent from such occupant or lessor, and may maintain an action therefor after having, in another action, obtained judgment quieting his title as against such occupant or lessor.

From the Henry Circuit Court.

W. Grose and *A. M. Grose*, for appellant.

R. L. Polk and *Brown & Brown*, for appellee.

DOWNEY, C. J.—Action by the appellee against the appellant. The facts in the complaint are the following: That in September, 1871, Micajah C. Fortner and Samuel Winings were the equal owners as tenants in common of certain real estate, which is particularly described in the complaint; that said Fortner then conveyed to the plaintiff, by warranty deed, his undivided half of said real estate; that on the 4th day of March, 1872, the defendant, without the consent of the plaintiff, took possession of the whole of said real estate, claiming to be the owner thereof by virtue of a sheriff's deed, and continued to occupy and use the same, by himself and tenants, from that day until September 5th, 1874, and received during that time in money from said tenants the sum of two hundred and forty-eight dollars as rent for said premises, and has a claim against said tenants on account of such renting, for sixty-two dollars additional; that at the April term, 1874, of the said Henry Circuit Court, this plaintiff brought suit against said Samuel Winings and the defendant, averring in his complaint that he was the owner in fee simple of the undivided one-half of said premises, and said Winings was owner of the other half, and that the defendant, Joseph Winings, claimed to be the owner of said premises, though, in fact, he had no title thereto, and that his claim was a cloud upon the plain-

Winings v. Wood.

tiff's title, and praying that said plaintiff's title thereto be quieted, and that partition of said premises be made, and said plaintiff's one-half thereof set off to him, and in the event that that could not be done, that said premises be sold and the one-half of the proceeds be paid to him; that said defendant appeared to said action and filed his answer to said complaint, claiming therein to be the sole and exclusive owner of said premises, and made his said sheriff's deed, under which he claimed title, a part of his said answer; that said cause was submitted to said court, and the judgment of the court was, that this plaintiff was the owner of the undivided one-half of said premises, and said Samuel Winings of the other one-half, and that said Joseph Winings was not the owner of any part thereof, and had no title or claim thereto, and that plaintiff's title be quieted and set at rest, and that said Joseph Winings be forever enjoined from setting up title or claim to said premises; and the court found that said premises could not be divided, and on motion ordered that the same be sold, and for that purpose appointed a commissioner to make sale of said premises and divide the proceeds; and said commissioner duly sold said premises at public sale, on, etc. A complete transcript of said pleadings and judgment is filed herewith and made part of this complaint. It is further alleged that the use of said premises from March 4th, 1872, to September 5th, 1874, was and is of the value of three hundred and ten dollars; and that said sheriff's deed is the only title or pretence of title of said defendant to said premises; and that it was under and by virtue of the same that he occupied and claimed said premises and the rents and profits thereof; that the defendant, during said time that he occupied and used and rented said premises, did so claiming to be the sole owner thereof, and entitled thereto, and all the time denied plaintiff's right thereto, and received said rents, claiming them as his own, and converted them to his own use. Prayer for judgment for one hundred and eighty dollars.

The defendant demurred to the complaint on the ground

Winings v. Wood.

that it did not state facts sufficient to constitute a cause of action, and the demurrer was overruled.

The defendant then answered, stating, in substance, that he admits the ownership of said real estate, in the complaint described, by said Fortner and Samuel Winings, as therein alleged, and the conveyance by said Fortner to the plaintiff by quitclaim deed; that on the 4th day of March, 1872, the defendant received the sheriff's deed for said real estate, as shown by the deed filed herewith and made part of this answer, and by means thereof claimed title to and ownership of said real estate, and at the time of receiving the deed rented said real estate to Granville Fortner for one year, and received therefor one hundred and twenty-five dollars; and again, on the 26th day of April, 1873, he rented said premises, still claiming title thereto and ownership thereof, to John Foster, for one year, and at the end of the year received therefor one hundred and twenty-four dollars, making in all two hundred and forty-eight dollars; of all of which renting and use by said tenants, and the reception of the rents as aforesaid by the defendant, he, said plaintiff, then and there had full notice and knowledge. He denies that Micajah C. Fortner conveyed said real estate in fee and by a warranty deed to the plaintiff, but admits a release by quitclaim deed to one-half of said real estate. He denies any use and occupation, or receiving or claiming any rent for said premises, other than as above stated, and states that at the said time, when, etc., he, said defendant, claimed title to said premises and had no notice that said plaintiff claimed the rents, or for the use of said premises, as stated in the complaint. He also denies that any relation of landlord and tenant ever existed between said plaintiff and defendant in relation to said premises, or the use and occupation thereof, or that he received said rents for the use of the plaintiff; wherefore, etc.

A demurrer was filed to the answer by the plaintiff, on the ground that the same did not state facts sufficient to constitute a defence to the action, and the demurrer was sustained.

Winings v. Wood.

The defendant failing to answer further, there was an assessment of the damages by the court, and final judgment for the plaintiff.

The errors assigned are the overruling the demurrer to the complaint and sustaining the demurrer to the answer.

It is urged by counsel for the appellant, that the complaint is bad for the reason that there was no sufficient judgment rendered on the finding of the court in the action for partition and to quiet title, to enable the plaintiff in this action to recover for the mesne profits or for use and occupation of the premises. It was not sought by the plaintiff to recover for the mesne profits or for use and occupation in the former action. He there sought to have partition as between himself and his co-tenant, and to have his title quieted as against the defendant. He now seeks to recover for the mesne profits or for use and occupation. We see no reason why he may not do so upon the facts stated. We need not decide whether the action is to be regarded as for mesne profits or for use and occupation.

We think there is no defence disclosed in the answer. It does not controvert the fact that the plaintiff was found to be the owner of the real estate, and his title quieted, nor that the defendant was in possession of the premises by his tenants and received the rents and profits. It was not essential that the defendant should have been in possession of the property himself. It was not necessary that the deed from Micajah C. Fortner to the plaintiff should have been a warranty deed. It was sufficient that the title was conveyed, though it was by a deed of release and quitclaim. Nor do we think the relation of landlord and tenant need to have existed between the plaintiff and the defendant, to entitle the plaintiff to recover. It is expressly enacted that "the occupant without special contract, of any lands, shall be liable for the rent, to any person entitled thereto." 2 G. & H. 360, sec. 14.

The judgment is affirmed, with five per cent. damages and costs.

THE TOWN OF CICERO v. CLIFFORD ET AL.

BONDS.—Coupons.—Municipal Corporation.—Where a municipal corporation has power to issue and negotiate bonds for a certain purpose, with interest payable at stated intervals, the payment of the interest may be provided for by coupons attached to the bonds, executed at the same time, referred to in the bonds, and themselves referring to the bonds to which they are attached, of which they, in substance, constitute parts.

SAME.—Suit on Coupon.—Such a coupon, detached from its bond, is negotiable, and, when matured, forms, by itself, a cause of action against such corporation.

PLEADING.—Payment.—Special Finding.—Where, in an action upon a money demand on contract, there has been no answer of payment, the court, in its conclusions of law upon a special finding of the facts showing partial payment, cannot allow such payment.

From the Hamilton Circuit Court.

J. W. Evans and *R. R. Stephenson*, for appellant.

D. Moss, for appellees.

DOWNNEY, C. J.—The town of Cicero, for the purpose of erecting a public school building, issued and sold its bonds, with coupons attached for the interest as it should fall due. This was an action by the appellees, owners and holders, against the town, upon several of such coupons. The coupons are in the following form:

“The town of Cicero, Indiana, will pay the bearer twenty-five dollars, at the New York National Exchange Bank, in the city of New York, on the 1st day of March, 1873, being six months interest on bond number three.

“S. D. SHANNON, Prest.

“H. A. CUMMINGS, Clerk.”

The first question made is as to the authority of the town to issue and negotiate bonds with coupons. It is conceded that the town had power to issue and negotiate bonds for such purpose, but it is contended that it could not issue bonds with coupons.

The bonds were issued under the act of March 11th, 1867, Acts 1867, 24, in 3 Ind. Stat. 116; and the act of May 15th,

53	191
139	414
53	191
143	486

The Town of Cicero v. Clifford *et al.*

1869, Acts 1869, Special Sess. 31. We find nothing in these acts sanctioning the views of the appellant. The last named act authorizes the bonds to be made payable "in not less than one year nor more than twenty years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided." In substance, the coupons are parts of the bonds. They are executed at the same time and are attached to and referred to in the bonds, and they, in turn, refer to the bonds of which they are parts. Such is the usual form of municipal bonds, and its convenience commends it to general use. We think there is nothing in the objection.

It is further insisted by counsel for the appellant, that an action cannot be predicated and sustained upon detached coupons. This cannot be the law. The coupons in question are negotiable paper, and may circulate as such when detached from the bonds. They are complete in themselves, and form a valid and sufficient cause of action. *National Exchange Bank v. Hartford, etc., R. R. Co.*, 8 R. I. 375.

On the trial, the court, at the request of the defendant, made a special finding of the facts, with conclusions of law, to which there was an exception by the defendant, and this is assigned as error. It is claimed by appellant that the special finding of facts shows that the coupons in question had been paid, except as to a small amount. To this it is answered, that there was no answer of payment, and therefore the court was right in holding that the payment could not be allowed. To this it is replied, in effect, that when there is a special finding, the court is not confined to the issues in making its finding. We think this last position cannot be sustained. It has been decided otherwise by this court. *Boardman v. Griffin*, 52 Ind. 101; *Casad v. Holdridge*, 50 Ind. 529. For these reasons, there was no error in the conclusions of law.

The judgment is affirmed, with costs.

Boaz v. McChesney.

BOAZ v. McCHESNEY.

53	193
128	364
53	193
139	170

VENDOR AND PURCHASER.—Incumbrances.—Will.—Discretionary Power of Executor.—It was provided by a will that the executor named therein, acting upon his best judgment, should sell the real estate of the testator, and convey the same by good and sufficient title to the purchaser. Said executor sold said real estate, without any contract as to incumbrances, and conveyed it by deed without covenant against incumbrances.

Held, that the fact that after said conveyance, taxes, in a certain amount, upon said real estate, being a lien thereon at the time of said sale and conveyance, were paid by the purchaser, to save the real estate from sale therefor, and to remove the incumbrance thereof, constituted no defence to an action against him for purchase-money.

From the Marion Superior Court.

W. W. Woollen, Jr., for appellant.

T. H. Bowles, for appellee.

BIDDLE, J.—Suit on a promissory note, not negotiable by the law merchant, secured by mortgage, brought by the appellee against the appellant. The note was payable to the order of James M. Ray, executor of Jeremiah McChesney, deceased, endorsed by the payee to Sarah G. McChesney, and by her to G. G. McChesney, who endorsed it to the appellee. The answer to the complaint will sufficiently show the facts upon which the only question contested in the case arises.

“Naomi J. Boaz, defendant, for answer to the complaint in the above entitled cause, says that on the 10th day of August, 1867, Jeremiah McChesney, then living, executed his last will and testament, a copy of which is herewith filed and marked exhibit ‘A.’ She further says that in said will the said Jeremiah McChesney appointed James M. Ray his sole executor, and provided that said executor, acting upon his best judgment, should sell the real and personal estate of said testator, either at public or private sale, with or without notice or appraisement, for cash or on credit, or both, and at such price as he should deem best, without any

Boaz v. McChesney.

application to any court for authority so to do, or any order, confirmation, or restriction therefrom, in relation thereto, and convey the same by good and sufficient title to said purchaser. She further says that, on the — day of November, 1867, said Jeremiah McChesney departed this life and left surviving him his widow, Sarah G. McChesney, and his son, George G. McChesney, who are the endorsers of the note herein sued on, and his daughter, Mary J. McChesney, who is the plaintiff to this suit; that on the 9th day of May, 1868, his said will was duly admitted to probate, and that on the 10th day of August, 1868, the said James M. Ray was duly qualified as said executor and accepted of said trust. She further says that, on the 10th day of April, 1872, said Ray, as such executor, for and in consideration of the sum of six thousand dollars, sold and conveyed to this defendant the real estate in the conveyance described; a copy of said deed of conveyance is filed herewith and marked exhibit 'B.' She further says that it was the contract by and between said James M. Ray and this defendant, on said 10th day of April, 1872, that she should pay two thousand dollars in cash, in part payment of said purchase price of six thousand dollars, and execute her two certain notes for the sum of two thousand dollars each, for the balance thereof, payable in one and two years from that date; and that, in pursuance of said contract, this defendant did, on said 10th day of April, 1872, execute and deliver to him, said Ray, said notes, and paid him said sum of two thousand dollars in cash. She further says that said James M. Ray, executor, did not convey to this defendant a good and sufficient title to said real estate, and that at the date of said conveyance it was not free and clear of incumbrance, but that, on the contrary, there was assessed against the same taxes for the year 1872, which were an incumbrance and charge against said decedent's estate. She further says that said James M. Ray, as executor of said estate, and Sarah G. McChesney, George G. McChesney, Mary J. McChesney, nor either of them, have ever paid said taxes, so assessed against said real estate, but

Boaz v. McChesney.

that, on the contrary, they allowed the same to become delinquent, and said real estate to be advertised for sale, to pay the same, and that this defendant, to save said real estate from such sale, and to remove said incumbrance, has paid the same, amounting to one hundred and fifteen dollars and ninety-six cents, as will more fully appear by copies of receipts herewith filed and marked exhibits 'C.' and 'D.' She further says that said second note, being the one herein sued on, was placed in the office of the Indiana Banking Company, in the city of Indianapolis, for collection, and that on the — day of —, 1874, at the counter of said bank, she tendered to the holder of said note the receipts of said county and city treasurers for said taxes, for the sum of one hundred and fifteen dollars and ninety-six cents and the sum of six hundred and seventy-two dollars and ninety-three cents, in cash, in payment of balance due on said note, and demanded cancellation and delivery of the same. She further says that said Sarah G., George G. and Mary J. McChesney are the legatees named in the will of said Jeremiah McChesney, deceased. She further says that she had no notice of the assignment of said note to said plaintiff before paying said taxes. Wherefore," etc.

The sufficiency of this answer to bar the action, raised by a demurrer for want of alleged facts, is the main question in the case, and the only one discussed by the parties in their briefs.

It is plain that the will cannot be construed as a contract between the deviser and the purchaser of the land to convey it with a covenant against incumbrances; there is no such contract between the executor and the purchaser alleged in the answer; and there is no such covenant contained in the deed accepted by the purchaser. We cannot perceive, therefore, upon what ground the answer can stand. It is true, the will empowers and directs the executor to sell any of the real or personal estate of the deviser, and convey the same, in his discretion, "by good and sufficient title." Conceding that these words, used in a contract between a ven-

Abbott, Auditor, *et al.* v. Edgerton.

dor and vendee of lands would obligate the vendor to convey with covenants of warranty against incumbrances, yet in this will they are merely words of discretionary power and authority. A power or authority to perform an act is not necessarily an obligation to perform it, much less is it the accomplished fact itself. The principle decided in *Martin v. Beasley*, 49 Ind. 280, is in point with this case. In that case, DOWNEY, J., in delivering the opinion of the court, says: "There is no warranty in such sales or in the conveyance usually made by an executor or administrator. Unless otherwise ordered by the court, they sell and convey the land subject to all incumbrances." The same principle supports the following cases:

Foltz v. Peters, 16 Ind. 244; *Clarke v. Henshaw*, 30 Ind. 144; and *Headrick v. Wisehart*, 41 Ind. 87.

There is no error in the record. The judgment is affirmed, with costs.

ABBOTT, AUDITOR, ET AL. v. EDGERTON.

53	196
136	502

TAX.—*Delinquency of November Instalment.*—*Penalty.*—Where a person charged with taxes on a tax duplicate in the hands of a county treasurer has paid one-half of said taxes, on or before the third Monday of April of the year following that for which such taxes are imposed, as provided by section 1 of the act of March 8th, 1873, Acts of 1873, Reg. Sess. 205, the penalty provided by the act of December 21st, 1872, Acts of 1872, Spec. Sess. 57. for delinquent taxes, still attaches to the other half of said taxes, unless said other half be paid on or before the 15th of November following, in the same manner as it attaches to the whole amount charged if none or less than one-half be paid on or before the third Monday of April. Sections 155 and 172 of said act of 1872, are not repealed or amended by said act of 1873, so far as the penalty for the non-payment of said last instalment of the taxes is concerned. (BIDDLE, J., dissented.)

SAME.—*Collection of Tax on Land, the Owner Having Personalty Within the County.*—*Injunction.*—An injunction will lie at the suit of the owner of land, to prevent the county auditor from advertising it for sale, and the

Abbott, Auditor, *et al. v.* Edgerton.

county treasurer from selling it, for the payment of delinquent taxes thereon, while said owner also owns leviable personal property within the county, sufficient to pay said taxes.

From the Allen Circuit Court.

R. C. Bell and *C. A. Buskirk*, Attorney General, for appellants.

W. H. Coombs and *J. Morris*, for appellee.

BIDDLE, J.—Joseph K. Edgerton brought this action against William A. Abbott, auditor, and John Ring, treasurer of Allen county, to enjoin the collection of certain penalties and interest upon taxes assessed against certain lands owned by the appellee. The facts alleged in the complaint necessary to present the questions involved may be stated as follows:

That the appellee is the owner of certain lands in Allen county, describing them, which are charged with taxes, stating the amounts, for the year 1873; that he paid one-half of said taxes to said treasurer before the third Monday in April, 1874, according to the act of March 8th, 1873, Acts Reg. Sess. 205; that the balance of said taxes remains unpaid; that the treasurer, after the 15th day of November, 1874, returned said lands to the auditor as delinquent, for the non-payment of the balance of the taxes thereon, due on the said 15th day of November, 1874; that the auditor has recorded said lands in his office as delinquent, and charged thereon the amount of said unpaid taxes, with interest and a penalty of ten per cent. and the taxes for the current year, 1874; and has also delivered to the treasurer a list of said lands as delinquent, and is about to advertise the same for public sale, on the second Monday of February, 1875, to pay said taxes, interest and penalty; that as soon as the appellee was informed of these facts, he protested against such intended action by the auditor; that on the 21st day of December, 1874, the appellee, having learned that the duplicate was in the hands of the treasurer for collection, tendered to him the amount of taxes for the year 1873,

Abbott, Auditor, *et al.* v. Edgerton.

remaining unpaid, exclusive of any penalty and without interest, which amount was refused; that the appellee, on the 22d day of December, 1874, delivered a written notice to the auditor not to so advertise said lands, that the appellee had personal property within the county sufficient to satisfy the unpaid taxes, that he was willing to pay the same and had tendered the amount to the treasurer, which he had refused to accept; to which notice the auditor replied, that he should proceed to advertise and sell said lands as intended; that the appellee is a resident of said county, and has sufficient personal property therein to pay all taxes lawfully assessed against said lands that now remain unpaid; that no levy or other effort has been made to collect said unpaid taxes from the personal property of said plaintiff; that the auditor still threatens to so list and advertise said lands, and before the appellee can give the proper notice of this application, will commence the publication of said lands for sale, as delinquent.

Prayer, that the auditor be enjoined from so listing and advertising said lands, and that the treasurer be enjoined from collecting said interest and penalties, and for general relief.

A demurrer to the complaint, for alleged insufficiency of facts, was overruled. Judgment on the demurrer, enjoining the auditor from advertising the lands, and enjoining the treasurer from selling the same, or assessing a penalty thereon. The proper exceptions were reserved, and an appeal taken.

Section 155 of the act approved December 21st, 1872, Acts Spec. Sess. 1872, 101, reads as follows:

“Sec. 155. In case any person shall refuse or neglect to pay the tax imposed on him, the county treasurer shall, after the third Monday of April, levy the same, together with ten per centum damages, and the costs and charges that may accrue, by distress and sale of the goods and chattels of such person who ought to pay the same, wherever the same may be found within the county: *Provided*, that the county treas-

Abbott, Auditor, *et al.* v. Edgerton.

urer shall at all times have power to levy and collect [delinquent] or other than a current year's taxes; and it is hereby made such treasurer's duty to levy and collect such delinquent taxes, whether they be charged upon a current year's duplicate, or otherwise, as well before as after his return and settlement for a current year's taxes."

Section 172 of the same act reads as follows: "There shall be a penalty assessed of ten per cent. upon the amount of taxes returned delinquent, which the persons or property assessed shall be liable to pay, together with interest upon the whole amount till paid." Acts Spec. Sess. 1872, 104.

The first section of the act of March 8th, 1873, Acts of Reg. Sess. 1873, 205, which is supplementary and amendatory to the act of December 21st, 1872, reads as follows:

"Section 1. * * That each person or taxpayer charged with taxes on a tax duplicate in the hands of a county treasurer, may pay the full amount of such taxes on or before the third Monday in April, or may, at his option, pay one-half thereof on or before the said third Monday in April, and the remaining half on or before the fifteenth day of November following: *Provided, however,* that all road taxes so charged shall be paid prior to the fifteenth day of November in the manner prescribed by law: *And provided further,* that in all cases where as much as one-half of the amount of tax charged against a tax payer shall not be paid on or before the third Monday in April, the whole amount charged shall become due and be returned delinquent, and collected as provided by law: *And provided further,* that the provisions of sections one, two and three of this act shall not apply to the tax for the year 1872."

The fourth section of the act of March 8th, 1873, which is an amendment of section 159 of the act of December 21st, 1872, and therefore is the one now in force, reads as follows:

"Sec. 4. * * The several county treasurers be and are hereby required immediately after their April settlement with the county auditor, either in person or by deputy, to call upon every delinquent tax payer in their respective

Abbott, Auditor, *et al.* v. Edgerton.

counties, and if necessary to distrain property for the collection of such delinquent tax, together with ten per centum damage, and the costs and charges that may accrue." Acts Reg. Sess. 1873, 206.

The remainder of this section refers to the settlement of the treasurer with the auditor, and does not, as we can perceive, affect this case; and we think that what we have quoted from the two acts is all the statute law that bears upon the questions we are considering. The act of March 8th, 1873, repealed all acts or parts of acts conflicting with its provisions.

Section 1 of the act of March 8th, 1873, repeals sections 155 and 172 of the act of December 21st, 1872, so far as it is in conflict with them. Sections 155 and 172 impose the penalty on taxes, if not paid before the third Monday of April in each year. Section 1 of the amendatory act relieves the tax of its penalty in all cases where one-half of it is paid before the third Monday in April; but in cases where none, or less than half, before that day, has been paid, the penalty still attaches. The remaining half of the tax may be paid on or before the fifteenth day of November following. A majority of the court are of opinion that the penalty still attaches to the deferred payment of one-half of the tax, unless it is paid on or before the fifteenth of November, the same as it does on the whole amount, if none or less than half is paid on or before the third Monday of April; that sections 155 and 172 are not repealed or amended by the act of March 8th, 1873, so far as the penalty for the non-payment of the last instalment of the tax is concerned; and that this construction reconciles and gives uniformity to both acts.

We are all of the opinion that the auditor could not legally advertise, nor the treasurer legally sell, the land, while the appellee owned leviable personal property within the county sufficient to pay the taxes assessed against him. *Catterlin v. Douglass*, 17 Ind. 213; *Bowen v. Donovan*, 32 Ind. 379; *Ring v. Ewing*, 47 Ind. 246.

Abbott, Auditor, *et al.* v. Edgerton.

And there is no doubt in our minds but that an injunction was the proper remedy to relieve the appellee. *The Toledo, etc., R. R. Co. v. The City of Lafayette*, 22 Ind. 262; *McPike v. Pen*, 51 Mo. 63; *Green v. Beeson*, 31 Ind. 7; *Pugh v. Irish*, 43 Ind. 415; *Knight v. The Flat Rock, etc., Turnpike Co.*, 45 Ind. 134.

The judgment is affirmed, with costs.

WORDEN, J., was absent.

BIDDLE, J.—I concur with the conclusion of the opinion as above written, but, in my view, no penalty can rightfully attach for the non-payment of the November instalment of the tax.

It is a familiar maxim of the law, in which we all concur, that penal statutes must be construed strictly; but in the application of this well-settled rule to the present case, I do not agree with the majority of the court. The penalty upon taxes, for their non-payment within a given time, is, at best, but a kind of “smart money” inflicted on the taxpayer for a mere failure to do an act, without any commission of wrong on his part, or any opprobrious fault of omission, to be collected summarily, without trial or judgment. Such a penalty must be strictly construed.

Section 172 was enacted in reference to the penalty incurred under section 155. At the time it was so enacted, there was no law declaring a penalty for the non-payment of tax due on or before the fifteenth day of November. It can not, therefore, have any reference to such delinquency. There is no section, clause or sentence in either of the two acts which imposes a penalty for the non-payment of tax, except the delinquency occurs on the third Monday of April. No penalty is declared anywhere for the non-payment of the second instalment of tax, which need not be paid before the fifteenth day of November following. Section 4 cannot be so construed, for that refers to the action of the treasurer immediately after his settlement with the auditor, and can be applicable only to taxes where none, or less than one-half, was paid before the third Monday of

Rose v. Grinstead.

April previous. Besides, a penalty cannot be imposed by implication or construction. It must rest upon express statute law. This is a firmly settled principle. It is very clear that the act of 1873 imposes no penalty for the non-payment of the November instalment of taxes, and to hold that section 172 of the act of 1872 imposes such penalty, when none existed at the time, and none such has been created since, seems to me not only unwarranted by the acts themselves, but unsound in reason, and unsafe to legal rights. In *Smith v. The State of Maryland*, a late case decided by the Court of Appeals of Maryland, but not yet reported, it was held, that "the repeal of a law imposing a penalty is of itself a remission of the penalty when there is no reservation." In my judgment, this expresses the true principle upon which the case before us should be decided.

ROSE v. GRINSTEAD.

PRACTICE.—*Offer to Confess Judgment.*—Before the trial of a pending action, the defendant offered in writing "to confess judgment for" a certain sum, "with costs accrued to the present time" in said cause; and the plaintiff declined to accept said offer, and on the trial there was a finding for the plaintiff for a smaller sum.

Held, that said offer was sufficient, and that the judgment was properly rendered for the amount of the finding with costs accrued up to and including the day on which said offer was made.

From the Jennings Circuit Court.

J. D. New and *T. C. Bachelor*, for appellant.

D. Overmyer and *J. Bundy*, for appellee.

BIDDLE, J.—Complaint by appellant against the appellee for breaking the appellant's close and cutting down and carrying away his timber therefrom. Answer:

1. Denial

2. Settlement and payment before suit.

3. License.

Demurrer to second and third paragraphs of answer for want of alleged facts; demurrer overruled; exceptions taken; trial by the court; finding for appellant for fourteen dollars and ninety cents. Before trial, appellee had offered in writing to allow judgment to be taken against him in the following words:

“The defendant, Jasper H. Grinstead, offers to confess judgment for thirty dollars, with costs accrued to the present time in the above entitled case. February 28th, 1874.

“JASPER H. GRINSTEAD.”

This offer the appellant declined to accept. The court rendered judgment in favor of appellant upon the finding, and for costs accrued up to and including the day upon which the offer to confess judgment was made. To this the appellant excepted, and insists that the offer to confess judgment is insufficient. We think differently. It is good. *Holland v. Pugh*, 16 Ind. 21; *Harris v. Dailey*, 16 Ind. 183.

He also insists that the court erred in overruling the demurrers to the second and third paragraphs of the appellee's answer. We are of the opposite opinion; each of the paragraphs is good.

The judgment is affirmed, with costs.

O'CONNER v. ARNOLD ET AL

PRINCIPAL AND AGENT.—*Attorney.*—*Ratification.*—An account having been placed in the hands of an attorney by the creditor for collection, and the attorney having presented it to the debtor for payment, the debtor afterwards paid a part of the claim to another person who occupied the same office with said attorney, and who gave a receipt for the money so paid, signed by him as for said attorney, but who had no business connection with said attorney, and had no authority from him or from said creditor to receive said payment, which act was not ratified by said creditor,

O'Conner *v.* Arnold *et al.*

but was ratified by his said attorney, who never received the money so paid, and who afterwards repudiated said act, on learning that his client had never received the money so paid.

Held, in an action on said account, that the creditor was not bound by said payment.

From the Shelby Circuit Court.

S. Major, for appellant.

C. Wright and *G. M. Wright*, for appellees.

BIDDLE, J.—The appellees placed an account against the appellant, for merchandise sold and delivered to him, in the hands of Richard Norris, an attorney, for collection. Norris proceeded by suit and recovered judgment against the appellant for four hundred and ninety-seven dollars and thirty-four cents. This is the judgment before us, which the appellant seeks to reverse.

Before suit was brought, while the account was in the hands of Norris for collection, and after it had been presented for payment to the appellant by Norris, the appellant paid to G. D. Henkle, to be credited on the account, one hundred and fifty dollars, for which Henkle, who occupied the same room with Norris, but had no business connection with him, gave a receipt accordingly, signed, "Richard Norris, per G. D. Henkle." At the time Henkle so received the money from the appellant and gave the receipt for it, he had no authority from the appellees nor from Norris to so receive it. On being told of the transaction by Henkle, Norris ratified the act; but, afterwards, on ascertaining that the appellees never had received the money so paid to Henkle by the appellant, he repudiated the act of Henkle. The money never came to the hands of Norris, and the appellees never authorized nor ratified the act of Henkle. Were the appellees bound by the payment thus made to Henkle by the appellant and so ratified by Norris? This is the sole question in the case. If they were so bound, the judgment is too much by one hundred and fifty dollars and interest upon it. If they were not so bound, then the judgment is right.

“When a demand is placed in the hands of an attorney at law for collection, without any special instructions, the authority conferred upon, and the duty assumed by, him is [are] to use due diligence to collect the debt by suit or otherwise. He has no authority to compromise with the debtor, and cannot bind his principal by any arrangement short of an actual collection of the money.” *Miller v. Edmonston*, 8 Blackf. 291. The same principle is adhered to in *Corning v. Strong*, 1 Ind. 329. The agency of Norris involved in its duties particular learning and professional skill. These he could not delegate. The act of an agent appointed by an agent will not bind the original principal, unless the appointment of such sub-agent was by authority expressed or implied, or afterwards ratified by the principal. The relation of principal and agent did not exist between the appellees and Henkle, and it is plain that Norris could not, by virtue of his agency from the appellees, appoint Henkle a substitute, so as to make his acts bind the appellees; and if this be plain, it is just as plain that the ratification of Henkle's acts by Norris did not bind the appellees. If he could not authorize the act, he could not ratify it. When the appellant paid the money to Henkle, he had no reason to suppose that Henkle was the agent of the appellees, or that his act would bind them. Indeed, he had strong reasons to believe otherwise; because he knew that the claim was in the hands of Norris for collection. We are of opinion that the one hundred and fifty dollars was not a proper credit against the account of the appellees. The two cases cited above we regard as in point with this case. The following cases touching agencies, though not directly in point, fortify this opinion:

Smith v. Gibson, 6 Blackf. 369; *Kirk v. Hiatt*, 2 Ind. 322; *Pruitt v. Miller*, 3 Ind. 16; *Reitz v. Martin*, 12 Ind. 306; *Berry v. Anderson*, 22 Ind. 36; *Cruzan v. Smith*, 41 Ind. 288; *Rathel v. Brady*, 44 Ind. 412; *The Indianapolis, etc., Union v. The Cleveland, etc., R. W. Co.*, 45 Ind. 281;

Mullikin v. Davis, Administrator.

Loomis v. Simpson, 13 Iowa, 532; *Smith v. Sublett*, 28 Texas, 163.

The judgment is affirmed, with costs.

MULLIKIN v. DAVIS, ADMINISTRATOR.

LIQUOR LAW.—*Appeal by Remonstrants.*—*Effect of Appeal.*—An appeal by remonstrants from an order of a board of county commissioners granting a license to sell intoxicating liquors in a less quantity than a quart at a time, under the liquor law in force in 1870, suspended the operation of said order; and during the pendency of such appeal the applicant could not lawfully so sell such liquors.

CONTRACT.—*Sale Prohibited by Law.*—When intoxicating liquor is sold at retail, contrary to a statute making such sale a misdemeanor, the seller cannot recover the price or value thereof from the buyer.

From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellant.

BIDDLE, J.—This suit was originally commenced by Jacob Young against the appellant, but before issue was joined, Young died, and the appellee, administrator of Young's estate, was admitted as plaintiff and filed a substituted complaint. The action is founded on a common count "for merchandise sold and delivered," and a bill of particulars informs us that the "merchandise" was "725 gills of intoxicating liquor."

Answer, 1. General denial.

2. That Jacob Young had applied to the Board of Commissioners of Monroe county for license to retail intoxicating liquors in less quantity than a quart at a time, against which application a remonstrance was filed; that the board granted the license, from which action of the board the remonstrators appealed to the Court of Common Pleas of Monroe county; that the liquors charged in the complaint were sold at retail in less quantities than a quart at a time,

Mullikin v. Davis, Administrator.

during the time said appeal was so pending; all with proper averments of time, venue, etc.

3. Payment.

Replies in denial; trial by jury; verdict for appellee; judgment, over the proper motions and exceptions necessary to bring the case here.

During the trial, the appellant offered in evidence the record of the Board of Commissioners of Monroe county, showing the application of Young for license to retail spiritous liquors, the remonstrance and appeal, as stated in the second paragraph of his answer, and also the record of the court of common pleas, and papers in the case pending in that court, to all of which the appellee objected, "for the reason that said evidence was immaterial to the issues in the cause," which objection was sustained by the court and exception properly taken to the ruling. This was erroneous. The appeal suspended the operation of the order made by the board of commissioners, and during its pendency the applicant could not lawfully retail intoxicating liquors in quantities less than a quart at a time. *Wright v. Harris*, 29 Ind. 438; *Molihan v. The State*, 30 Ind. 266; *Young v. The State*, 34 Ind. 46. And for intoxicating liquors, unlawfully sold at retail, contrary to a statute making such sale a misdemeanor, the appellee is not entitled to recover. *Siter v. Sheets*, 7 Ind. 132; *Melchoir v. McCarty*, 31 Wis. 252; the same case in 11 American Rep. 605. That a right of action cannot arise out of a vicious cause, is a settled maxim of the law. No man shall be allowed to set up his own misdemeanor as a cause of action against another. These principles are so fully and universally recognized, that authorities to support them have become unnecessary.

It should be remarked that the transactions involved in this case took place in 1870, during the time the temperance act of March 5th, 1859, 1 G. & H. 614, and the act supplemental to it, Acts 1861, 143, 3 Ind. Stat. 330, were in force.

The judgment is reversed, with costs; cause remanded,

Watkins v. Brunt *et al.*

with directions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

BUSKIRK, J., was absent.

WATKINS v. BRUNT ET AL.

PLEADING.—*Exhibits.*—Where a written instrument, made an exhibit to a complaint, does not constitute the foundation of the action, it cannot supply necessary averments of the complaint, or be noticed as a part thereof.

SAME.—*Action to Quiet Title.—Recording of Mortgage.—Subsequent Purchaser.* A complaint to quiet title to real estate alleged, that an owner thereof conveyed it with full covenants to the plaintiff and put him in possession thereof; that the defendant was asserting title thereto through a subsequent conveyance thereof to him made by the governor in pursuance of a sale by the auditor of state under a mortgage of said real estate executed to the treasurer of state by one who owned it before the plaintiff's grantor became such owner; that though said mortgage had been recorded in the county, before the plaintiff's grantor became the owner of the real estate, yet it had never been acknowledged by the mortgagor, nor was its execution ever proved, to entitle it to be recorded; and that the plaintiff had no notice of said mortgage until after said sale and conveyance to the defendant. Prayer, that the plaintiff's title be quieted, etc.

Held, that the complaint was sufficient.

From the Morgan Circuit Court.

W. R. Harrison and W. S. Shirley, for appellant.

C. F. McNutt and G. W. Grubbs, for appellees.

BIDDLE, J.—The appellant brought his complaint against the appellees, in which he alleges the following facts:

That on the 2d day of March, 1836, John Parker was the owner and seized of certain lands, describing them, and by an instrument in writing, made an exhibit, pretended to assign said lands (with others) to N. B. Palmer, treasurer of the State, to secure a loan of four hundred dollars, made to him by Palmer as said treasurer, which instrument was recorded in said county on the — day of —, 1836;

Watkins v. Brunt et al.

that afterwards, William W. Wilson became the owner of said lands by purchase for a valuable consideration, took possession of and occupied the same, to wit, twenty years, until the — day of —, 1871, when, in consideration of four thousand dollars, paid to him by the appellant, Wilson and wife conveyed the same to him with full covenants, and put him in possession thereof; that at the time of the purchase, he had no notice of the mortgage from Parker to Palmer aforesaid; that Wilson at the time was solvent, having an estate of the value of twenty thousand dollars, but afterwards became insolvent; that in 1873, the Governor of Indiana, Thomas A. Hendricks, conveyed the lands to the appellees in pursuance of a sale made by the Auditor of State, making a copy of the conveyance an exhibit, which conveyance the appellees caused to be recorded amongst the records of deeds in said county, and since then give it out to be known that they claim the land; until which time the appellant had no notice of Parker's pretended mortgage to Palmer, and upon such notice, at once tendered to the appellees five hundred and sixty-five dollars, being the amount they had paid for the land, with ten per cent. interest thereon, and brought the money so tendered into court; that the "assignment and transfer" to Palmer by Parker was illegal and void, because it had never been acknowledged by Parker, nor its execution ever proved, to entitle it to be recorded as averred; that the sale by the auditor and the conveyance by the governor create a cloud upon his title; etc., all of which is fully and specifically averred, with time, place, etc. Prayer, that the appellant be decreed the owner in fee simple of the land; that Parker's "assignment and transfer" to Palmer and the auditor's sale and governor's conveyance be declared void; that the appellees be enjoined from setting up title to the land; and for general relief.

The appellees filed a demurrer to the complaint, alleging the insufficiency of the facts charged, as cause. The demur-

Watkins v. Brunt *et al.*

rer was sustained. The parties stood by their pleadings, and the court rendered judgment for the appellees. Appeal. The errors assigned present the single question of the sufficiency of the complaint.

It is conceded by the appellees that the mortgage made by Parker to Palmer, Treasurer of State, not having been acknowledged or proved, was not entitled to record in Morgan county, and the fact that it was so recorded is not notice to a subsequent purchaser in good faith; but they contend that the mortgage was given to secure a loan from the school fund, and is, therefore, not subject to the general law requiring deeds and mortgages to be recorded in the county where the land lies; and that the record and proceedings in the auditor of state's office, in reference to such mortgages, amounts to constructive notice to all subsequent purchasers. The latter proposition is opposed by the appellant; and upon this controversy the parties have prepared elaborate briefs; but we cannot perceive that there is any such question presented by the pleadings. There is nothing before us but the complaint. Neither the mortgage, made by Parker to Palmer, nor the conveyance, made by the governor to the appellees, are properly exhibits. The action is not founded upon these written instruments, 2 G. & H. 104, sec. 78; it is brought to destroy them, and they need not, therefore, be filed with the complaint (*Vanschoiack v. Farrow*, 25 Ind. 310), and, when filed, do not supply the necessary averments in the pleading (*Knight v. The Flatrock, etc., Turnpike Co.*, 45 Ind. 134), and in this case cannot be noticed as a part of the complaint. *Trueblood v. Hollingsworth*, 48 Ind. 537. There is no averment that the mortgage made by Parker was given to secure a loan from the school fund, as is assumed by the appellees in their brief, nor from the saline fund, as seems to be admitted by the appellant, nothing, except that it is payable to the treasurer of state, to show us that it is different from any ordinary mortgage between individuals. The complaint on its face shows a good title in the appellant, derived from Wilson, and

 McMannus *et al.* v. Smith.

shows a title in the appellees, which they insist upon asserting, derived from a sale subsequently made, under the mortgage executed by Parker, which was not constructive notice to the appellant, and of which, as it is averred, he had no actual notice, with a prayer for proper relief. It seems to us that these averments make a good complaint. *McMannus v. Smith*, below on this page. It might be remarked that it shows no connecting link of title between Parker and Wilson, though both parties seem to treat it as if it contained such an averment. Doubtless, the pleader might have averred all the facts in the complaint necessary to present the questions which the parties have discussed in their briefs by demurrer; and doubtless, the same questions may be raised by alleging the proper facts in an answer; but it is certain that the questions discussed are not before us on the face of the complaint. The complaint, as it stands, is good, for the reasons above mentioned.

The judgment, therefore, is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings.

 McMANNUS ET AL. v. SMITH.

53	211
142	233

PLEADING.—Answer.—A paragraph of pleading filed by a defendant cannot be regarded both as a pleading alleging a defence and as a pleading seeking affirmative relief.

SAME.—Counter Claim.—Action for Recovery of Real Property.—In an action for the recovery of the possession of real estate, a pleading filed by the defendant alleged that he was the owner in fee simple of the real estate, describing it, and that the plaintiff was claiming and pretending to hold some interest therein as heir-at-law of a person named, and was endeavoring to dispossess the defendant, which claim was a cloud upon his title. Prayer, that the defendant's title be quieted and that the plaintiff be enjoined from setting up his claim.

Held, that this pleading was a counter-claim, and was sufficient to authorize the relief sought.

McMannus *et al.* v. Smith.

SAME.—*Pleading Title.*—*Fee Simple.*—In pleading title in fee simple, it is only necessary to simply state it, without alleging its derivation; and if a party pleading such title, in alleging his chain of title, leaves some of the links blank, this will not vitiate his pleading.

From the Owen Circuit Court.

J. H. Stotsenburg, for appellants.

S. Stansifer, for appellee.

BIDDLE, J.—Complaint in the usual form by the appellants against the appellee, to recover the possession of lands.
Answer:

1. General denial.

2. Statute of limitations.

3. "And for further and third answer in this behalf, and by way of cross-bill, the defendant says that he is the owner in fee simple of the lands in the complaint described, to wit," describing them the same as they are described in the complaint, then setting out his chain of title, several links of which, however, are blanks, in not stating the names of the vendors and vendees, dates, etc. The paragraph then concludes by averring, "that said plaintiffs are claiming and pretending to hold some interest in said lands as heirs-at-law of said Archer, and are endeavoring to dispossess him, which claim the defendant says is a cloud upon the title." Prayer, to quiet the title and enjoin the appellants from setting up any claim thereto. The appellants demurred to the third paragraph of answer, alleging, for cause of demurrer, that it "does not contain facts sufficient to constitute an answer to plaintiff's complaint, nor a cause of action against the plaintiff." The demurrer was overruled by the court, and the appellants refusing to plead further, judgment was rendered that the plaintiffs take nothing by their suit, and that the defendant recover his costs.

The third paragraph is pleaded as an answer and also as a cross-bill. This is not the approved practice in pleading. It should have been pleaded as the one or the other, and must be held to be one or the other, as the facts alleged will warrant, or insufficient for either. It

cannot be both. *Campbell v. Routt*, 42 Ind. 410. It is not an answer, for it neither denies nor confesses and avoids. True, it is analogous to the plea to an action founded on the ancient *writ of right* to recover possession in fee simple, under which the claimant was bound to allege seizin of the lands in himself, and then derive his title from such person to himself; to which the tenant might answer by denying the claimant's right and averring that he had a better right to hold the lands than the claimant had to demand them. In such an action, which was never brought except to test the fee simple, on the trial, one affirmative was met by another affirmative, and the stronger one prevailed. Thus the right to the land in fee simple was settled forever. This was called a real action, as distinguished from personal and mixed actions.

But real and mixed actions are now abolished in England by the statute of William Fourth; and the *writ of right* was never introduced into American jurisprudence. Indeed, it had fallen into disuse in England before the time of Blackstone, and given place to the easier form of ejectment, although it decided only the right of possession.

Is the third paragraph good as a counter-claim? This is the next question to be settled. It is called in the pleading a cross-bill, but our code does not even mention the word. The cross-bill was applicable only to chancery practice; but the code abolished the distinction between actions at law and suits in equity, and adopted the counter-claim as applicable to the present mode of procedure in all cases when, formerly, the cross-bill would have been the proper practice. The counter-claim in this case alleges the fee simple of the lands in the defendant, describing them, and avers "that said plaintiffs are claiming and pretending to hold some interest in said lands, as heirs-at-law of said Archer, and are endeavoring to dispossess him, which claim the defendant says is a cloud upon the title," and then prays to have his title quieted and the plaintiffs enjoined from setting up their claim. We think this is sufficient to authorize the

relief prayed for. The appellants, however, insist that the counter-claim is insufficient in not setting out the appellee's title properly. It is true, the appellee, in alleging his chain of title, has left several links blank, but it was not necessary to allege its derivation at all. In pleading a fee simple, it is only necessary to simply state it, because it includes the entire interest in the land; but in pleading an estate in lands less than a fee simple, it must be particularly described, or it would not appear what part of the fee simple it was, either in quantity of estate, time of its duration, or whether in severalty, coparcenary, or in common, or what one of the numerous parts into which the fee simple may be divided. *Knight v. McDonald*, 37 Ind. 463.

It seems to us that the court, upon overruling the demurrer to the counter-claim, and the appellants failing to plead further, might have granted the relief prayed for, instead of simply rendering a judgment for costs; but if this satisfied the appellee, the failure of the court to grant him other relief is not an error of which the appellants can complain.

The judgment is affirmed, with costs.

53	214
138	283

CRIM v. FITCH.

STATUTE OF FRAUDS.—*Debt of Another*.—A verbal contract between A. and B. for the payment by the former of an indebtedness of the latter to C. is not within the statute of frauds; and where B. has afterwards been compelled to pay said indebtedness, he may maintain an action on said contract against A.

From the Lawrence Circuit Court.

Wilson & Dunn and *Putnam & Friedley*, for appellant.

W. H. Edwards and *N. Crooke*, for appellee.

BIDDLE, J.—James M. Fitch was the owner of a threshing machine, which he had purchased from Aultman and

Crim v. Fitch.

Taylor, to whom he yet owed a balance due for the machine, upon which Aultman and Taylor held a mortgage to secure the debt. Fitch sold the machine to Joshua Crim. The consideration of the sale was, that Crim should pay Fitch twenty-five dollars, and pay Aultman and Taylor the balance due on the machine from Fitch to them. Crim paid the twenty-five dollars to Fitch, received the machine, and afterwards sold it to a third party, but failed to pay any part of the debt due from Fitch to Aultman and Taylor for the original purchase of the machine. Aultman and Taylor sued Fitch and collected the debt which Crim had agreed with Fitch to pay them for him as a part of the consideration for the purchase of the machine by Crim from Fitch. The agreement between Fitch and Crim was not in writing. Such is the substantial statement of the case by the appellant. The action is founded upon the above state of facts. We do not state the pleadings of the parties, nor the proceedings of the court. Suffice it to say, that the appellee recovered against the appellant, and that all the points raised, exceptions taken, and errors assigned by the appellant resolve themselves into the single question:

Was the agreement of Crim an undertaking "to charge any person upon any special promise to answer for the debt, default, or miscarriage of another," and therefore within the statute of frauds?

We think it clearly was not. Crim's promise was not made to Aultman and Taylor, but to Fitch to pay Fitch's debt to Aultman and Taylor. It was a promise to answer for his own debt, his own default, his own miscarriage, not for the debt, default, or miscarriage of another. If Crim's promise had been to Aultman and Taylor, to pay Fitch's debt to them, it would have been within the statute, and Aultman and Taylor could not have enforced the promise, unless it had been made in writing and properly signed. The distinction between the promise of Crim in this case, and a promise within the statute of frauds, seems to us very plain. This question was first decided in *Eastwood v. Ken-*

Harris v. Rivers et al.

yon, 11 A. & E. 438, which is a case in point, and approved by this court in *Colter v. Frese*, 45 Ind. 96.

The judgment is correct, and is affirmed, with ten per cent. damages, and costs.

58	216
145	529

HARRIS v. RIVERS ET AL.

PLEADING.—Set-Off.—Principal and Surety.—In an action upon a contract against two or more defendants, a claim in favor of one of the defendants cannot be pleaded by him as a set-off, without alleging that he is the principal in said contract and that his co-defendants are sureties therein.

SAME.—Tort.—In an action upon a contract, a claim in favor of the defendant against the plaintiff arising out of tort cannot be made a set-off.

ARREST OF JUDGMENT.—Where there is one good paragraph in an answer, which will uphold a judgment for the defendant, the judgment cannot be arrested because the answer contains other paragraphs which are not good.

From the Howard Circuit Court.

J. O'Brien, A. J. Younglove and W. M. Waters, for appellant.

N. R. Lindsay, for appellees.

BIDDLE, J.—Suit on a promissory note made by appellees to appellant. Answer in two paragraphs:

1. By Eli S. Rivers, admitting the note, and that it is unpaid, but alleging that he is the principal in the note and the other two appellees his sureties; and that the appellant is indebted to him in the sum of eight hundred and fifty dollars for money had and received, asking a set-off and judgment in his favor for the balance.

2. Also by Eli S. Rivers, that he had purchased certain walnut logs of the appellant, and entrusted the measurement of the logs to him; that he falsely and fraudulently measured the logs, whereby said Rivers was greatly damaged; all of which is set forth at tedious length; wherefore

he asks that the sum of eight hundred and fifty dollars may be set off, and claims judgment for the residue.

John Rivers and Andrew Radcliff, the other two makers of the note, answered that they were sureties, merely, with the usual prayer not to be held primarily liable, but no question is made upon their answer.

The general denial was replied to the two paragraphs of answer of Eli S. Rivers. Trial by jury; verdict in favor of Eli S. Rivers for two hundred and seven dollars and ninety-one cents; motion in arrest of judgment overruled; motion for a new trial overruled; exceptions to each ruling; and appeal to this court.

The motion in arrest of judgment was correctly overruled. True, the second paragraph of Eli S. Rivers' answer is insufficient. It shows no mutuality. In that paragraph he does not allege that he is the principal in the note and his co-defendants sureties. Besides, it sounds in tort. A tort cannot be made a set-off. The section (58, 2 G. & H. 89) by which he is authorized to plead a set-off in a case of this kind, requires it to be a "claim upon contract in favor of the principal defendant, and against the plaintiff." But the first paragraph of Eli S. Rivers' answer is good. The answer in this case stands to the verdict in favor of the appellant as a complaint; and when there is one good paragraph in a complaint which will uphold the judgment, it cannot be arrested because it contains other paragraphs which are not good. This is the common law practice, which is not changed by our present statute. Indeed, the subject, in reference to civil actions, is not mentioned in the code. 3 Blackstone, 393; *Clarkson v. M'Carty*, 5 Blackf. 574; *Newell v. Downs*, 8 Blackf. 523; *Knour v. Dick*, 14 Ind. 20; *The Indianapolis, etc., R. R. Co. v. Ballard*, 22 Ind. 448; *Kelsey v. Henry*, 48 Ind. 37; *Spahr v. Nicklaus*, 51 Ind. 221. Nor can a debt be set off against a tort. *Allen v. Randolph*, 48 Ind. 496.

The evidence is all in the record, and its sufficiency to sustain the verdict is properly raised. It tends—how

Bryant v. Hoskins et al.

strongly we need not say—to prove the facts alleged in the second paragraph of Eli S. Rivers' answer; but if it proved them overwhelmingly, it would not be sufficient. It is very clear that it does not prove a "claim upon contract," either express or implied. It neither proves, nor tends to prove, the facts alleged in the first paragraph of Eli S. Rivers' answer, and it is wholly insufficient to sustain the verdict. As the judgment must be reversed for this error, it becomes unnecessary to examine the other assigned errors, which will probably never arise again in this case.

The judgment is reversed, with costs; cause remanded, with instructions to sustain the motion for a new trial, etc.

BRYANT v. HOSKINS ET AL.

REVIEW OF JUDGMENT.—*New Matter.*—*Pleading.*—*Diligence.*—A complaint by A. against B. in the circuit court, to review a judgment rendered by the abolished common pleas of the same county, alleged, that A. was duly served with summons to answer B. in a suit on a promissory note alleged to have been made to the latter by the former for a certain sum; that A. did not appear to said suit, because theretofore he had executed a note to B. for a certain greater sum, which was the only note ever executed by A. to B.; and that he never signed the note so sued on or authorized any one to sign it for him, but that it was a forgery, which he did not discover until November, judgment thereon having been rendered against him by default in the previous May, in said court of common pleas, etc.

Held, that the complaint was insufficient.

From the Shelby Circuit Court.

K. M. Hord, A. Blair, D. B. Wilson, E. K. Adams and W. Bigler, for appellant.

B. F. Love and ——— *Conner*, for appellees.

BIDDLE, J.—Suit to review a judgment upon the alleged discovery of material new matter. The substance of the complaint is as follows:

Bryant v. Hoskins *et al.*

That the appellant was duly served with summons, on the 4th of February, 1873, to answer the appellee Joseph Hoskins, in a suit founded on a promissory note alleged to have been made to him by the appellant, John Barrett and James T. Frazier, for the amount of one hundred and sixty-eight dollars, brought in the Court of Common Pleas for Shelby county; that he did not appear to said action, "because, in the year 1872, he did, in connection with John Barrett and James T. Frazier, execute a note payable to Joseph Hoskins in the sum of one hundred and seventy dollars, which was the only note ever executed by said plaintiff in connection with John Barrett and James T. Frazier to said Joseph Hoskins; and that he never signed the said note in said suit, or authorized any one to sign the same for him, but that the same is a forgery, which he has not discovered until the 27th day of November, 1873;" that on the 26th day of May, 1873, judgment was rendered against him by default in said court of common pleas; that execution has been issued on said judgment, and delivered to the Sheriff of Shelby county, for execution; that the sheriff has levied it upon certain real estate belonging to the appellant, describing it, and that he will sell the same to satisfy said judgment, unless he is restrained. Prayer for a restraining order, that the judgment be set aside and the appellant allowed to make his defence to the original action.

A demurrer to the complaint, alleging the insufficiency of the facts therein stated to entitle the appellant to relief, was sustained. The appellant stood by his complaint, and excepted. Judgment was rendered for the appellees, and the appellant appealed.

The complaint is insufficient. It shows no fraud against the appellee Hoskins, and no reasonable diligence on the part of the appellant in defending his rights, but carries gross negligence upon its face. The facts charged do not entitle the appellant to relief. *Shelmire v. Thompson*, 2 Blackf. 270; *Gullett v. Housh*, 7 Blackf. 52; *Skinner v. Deming*, 2 Ind. 558; *Simpkins v. Wilson*, 11 Ind. 541. A

Bryant v. Hoskins et al.

complaint for a review of a judgment on account of material new matter, discovered since the trial, must show that the plaintiff used reasonable diligence to discover it, and that he could not by the use of such diligence have discovered such new matter before the former trial. *Bartholomew v. Loy*, 44 Ind. 393; *Comer v. Himes*, 49 Ind. 482.

In the case before us, the alleged new matter was open to be seen on the face of the complaint and the copy of the note filed with it in the court of common pleas. The appellant had due notice of the suit, and the lowest degree of diligence would have enabled him to discover it and defend himself against the alleged wrong. If he has suffered by his own negligence, the law cannot afford him relief. A rule that would relieve from such negligence would render human rights extremely insecure.

The judgment is affirmed, with costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1876, IN THE SIXTY-
FIRST YEAR OF THE STATE.

58 991
126 17

PARKS v. ZEEK.

CONTRACT.—*Promissory Note.—Pleading.—Answer.*—Suit by an assignee on a promissory note not payable in bank. Answer by the maker, that the note was given in consideration of a certain horse, purchased by said maker for himself and his father, named, and was to be signed by said maker and his father as a joint obligation; that at the time of the execution of the note, the payee was indebted to said maker and his father for work done and materials furnished at the payee's request, a bill of particulars thereof being made part of the answer, in a certain sum greater than the amount of the note; that while the payee held the note, he agreed with the maker and his father, in consideration of said indebtedness, that said horse should go in payment of said indebtedness, if the payee did not pay the same by doing certain labor; and the answer proposed to set off said indebtedness, and prayed judgment for costs and other relief.

Held, that this answer was not good as an answer of set-off, or as showing a want or failure of consideration, or as showing an accord and satisfaction, but was bad on demurrer for want of sufficient facts.

SAME.—*Evidence.—Written Contract.—Parol Contemporaneous Agreement.*—It could not constitute a defence to such note, that at the time of the execution thereof, the maker and payee verbally agreed that if the latter

Parks v. Zeek,

should not, by performing certain labor, pay a certain debt which the payee owed to the maker and a certain third person, and which the payee had promised to so pay, the consideration for which said note was given, being a certain horse then sold by the payee to the maker, should be regarded as paid for and should be applied as a credit upon said indebtedness of the payee; and that no part of said labor to be performed by the payee had ever been performed.

From the Wayne Circuit Court.

W. A. Bickle, for appellant.

J. P. Siddall and *A. B. Young*, for appellee.

WORDEN, C. J.—Zeek sued Parks before a justice of the peace, on a note endorsed by the payee to the plaintiff, of which the following is a copy:

“APRIL 21st, 1871.

“Nine months after date I promise to pay William Walker the sum of one hundred and fifteen dollars, for value received.

LEVI D. PARKS.”

The defendant filed the following answer before the justice, viz.:

“The defendant, Parks, for answer to the said note and complaint, says that said note was given in consideration of a certain horse purchased by the defendant for the benefit of himself and his father, Curtis Parks; that when said note was given, it was to be signed by defendant and said Curtis Parks, as a joint obligation; that when said note was given, and before then, said Walker was indebted to said defendant and his father for work and labor and materials found, in building and repairing houses, sheds and porticos for said Walker, at his request, in the sum of one hundred and fifty dollars; and while said Walker so held said note, in consideration of said indebtedness to defendant and his father, said Walker agreed with them that said horse should go in payment of said liability for said work, if he, said Walker, did not pay the same in digging a ditch; whereupon defendant offers said account for work and labor as a set-off, and files a bill of particulars, and prays judgment for costs and other relief.” Accompanying the answer is a bill of the particulars of the work and labor.

Such proceedings were had before the justice as that judgment was rendered for the plaintiff, and Parks appealed to the circuit court, where, after various proceedings not necessary to be here stated, a demurrer for want of sufficient facts, to the answer above set out, was sustained, and exception taken. The cause was tried by a jury, resulting in a verdict and judgment for the plaintiff, over a motion for a new trial.

The errors assigned by the appellant are the sustaining of the demurrer to the answer and the overruling of the appellant's motion for a new trial.

The answer, we think, was bad, and the demurrer to it properly sustained. It was not a good answer of set-off, for want of mutuality, the debt sought to be set off being a debt which Walker, the payee, owed to the defendant and his father jointly.

The answer admits by implication the execution, including the delivery, of the note, by the defendant to Walker, but alleges that it was to be signed by the defendant and his father as their joint obligation.

Why the defendant's father did not sign the note does not appear in the answer; but the fact that he did not sign it does not destroy the effect of the execution and delivery of the note by the defendant.

The answer is not good as showing a want or failure of consideration, for it alleges that the consideration was a horse purchased by the defendant for the use of himself and his father.

It is not good as showing an accord and satisfaction. It alleges the indebtedness of Walker to the defendant and his father, and that after the execution of the note, Walker agreed with them, in consideration thereof, that the horse should go in payment thereof, "if he, said Walker, did not pay the same in digging a ditch;" but it is not alleged that Walker did not pay the same in digging a ditch.

For aught that appears by the answer, Walker may have paid the indebtedness by digging a ditch.

Parks v. Zeek.

Again, the agreement seems to lack mutuality of obligation. It is not alleged that the defendant and his father agreed to accept the horse in payment of the indebtedness of Walker to them, in case he did not pay it in digging a ditch. There are probably other objections to the answer, viewed as an answer of accord and satisfaction. In any view that we can take of it, we think it was bad.

The causes for a new trial were, first and second, that the verdict was contrary to the law and evidence.

"3. The court erred, during the trial of the cause before the jury, while Levi D. Parks, the defendant, was on the stand testifying as a witness in said cause, in refusing to permit the defendant to prove by said witness that, when he went to purchase the horse for which said note was given, the said Walker was indebted to him and his father, Curtis Parks, one hundred and fifty dollars, for building him, said Walker, a house; that Walker had promised him and his father to pay for said building in digging a ditch; that at the time of negotiating for said horse, it was agreed by said defendant and said Walker that the defendant might take the horse for one hundred and fifteen dollars, and if he, Walker, did not pay for building said house by digging said ditch, during the succeeding season, then said horse should be considered as paid for, and go as a credit on the house; that it was upon this consideration the horse was purchased and the note given, and no other or different consideration; and that no part of said ditch was ever dug."

The residue of the causes relate to the instructions given by the court.

We are of opinion that the evidence offered and rejected was properly rejected. It went to vary and contradict the legal effect of the note sued upon. The note bound the maker, unconditionally, to pay the amount specified, at the maturity thereof. The evidence went to show that, at the time of the contract, it was agreed between Walker and the defendant, that if Walker did not pay his indebtedness to the

Parks v. Zeek.

defendant and his father, by digging the ditch, then the horse for which the note was given should be applied upon that indebtedness, and be considered as paid for, and, therefore, that the note was not to be paid at all.

In other words, the evidence went to establish the proposition that it was thus agreed that the note was to be paid only on the condition that Walker should pay his indebtedness to the defendant and his father by digging the ditch.

This was engrafting upon the note a parol condition of defeasance, which would contradict its terms and subvert its legal effect.

That this cannot be done by a cotemporaneous verbal agreement, is established by too many authorities in this State to justify the citation of them. Many of them are collected in Buskirk Prac. 360. See, also, *Durland v. Pitcairn*, 51 Ind. 426. Counsel for the appellee have cited *Adams v. Wilson*, 12 Met. 138, which is in point.

The instructions went upon the theory that the legal effect of the note could not be contradicted or varied by parol evidence of a cotemporaneous agreement between the parties, but that the parties might, subsequently to the execution of the note, make a valid agreement, based upon a sufficient consideration, which would control the note. They placed the law applicable to the case very fairly before the jury, and were not objectionable, as we think.

There is no cause for reversing the judgment upon the evidence.

The judgment below is affirmed, with costs.

Denbo v. Wright, Adm'r.

DENBO v. WRIGHT, ADM'R.

WITNESS.—Widow.—On the trial of an action against an administrator for the enforcement of a claim against the estate represented by him, the widow of the decedent is a competent witness to testify to the making of a settlement of the matter in controversy by her husband and the plaintiff in her presence and hearing.

SAME.—Administrator.—Incompetent Witness Testifying Without Objection.—On such a trial, it is error to permit the administrator to testify as a witness in his own behalf, without having been required to testify by the opposite party or by the court; but if he be permitted to so testify without objection or exception on the part of the adverse party, and no motion be made to strike out such evidence, the error will be waived.

EVIDENCE.—Irrelevant Evidence Admitted Without Objection.—Upon the trial of such an action, where no answer has been filed, the complaint is deemed to be controverted as if a denial were filed, and evidence of affirmative matter of defence, such as a settlement of the matter in controversy, is inadmissible; and where such evidence, foreign to the issue, has been introduced, it should be disregarded, though admitted without objection or exception.

From the Harrison Circuit Court.

G. W. Denbo and *G. W. C. Selfe*, for appellant.

L. Jordan and *H. Jordan*, for appellee.

BUSKIRK, J.—This was an action by the appellant against the appellee, as administrator of the estate of Pleasant D. Bean, deceased, for services rendered, money loaned and had and received. The claim, being disallowed, was transferred to the issue docket. There was no answer filed. Trial by the court. Finding for appellee. Motion for a new trial was overruled, and this ruling is assigned for error.

The widow of the decedent was permitted, over the objection and exception of appellant, to testify that the appellant and her husband made, in her presence and hearing, a settlement of the matters in controversy. This ruling is claimed to have been erroneous. We do not think it was. The widow of a decedent is a competent witness to testify to conversations and statements made by her husband to others, in her presence, relating to transactions between her husband and others; but she is not a competent witness to tes-

Denbo v. Wright, Adm'r.

tify as to statements made to herself by her husband. *Mercer v. Patterson*, 41 Ind. 440; *Griffin v. Smith*, 45 Ind. 366. There was no error in this ruling.

It is also claimed that the court erred in permitting the administrator to testify as a witness in his own behalf, without having been required to testify by the opposite party or the court. This was erroneous, but the appellant is in no condition to avail himself of such error. It is expressly stated in the bill of exceptions, that he was permitted to testify without objection or exception on the part of the appellant. Nor does it appear that any motion was made to reject or strike out such evidence. The error was waived. *Buskirk Prac.* 288 and 289, and authorities cited.

It is also insisted, that the finding of the court is not sustained by the evidence. We have carefully read and considered all the evidence. Upon the evidence offered by the appellant, consisting mainly of the admissions and declarations of the decedent, he was entitled to a judgment for about three hundred and fifty or four hundred dollars; but the appellee offered evidence tending to prove a settlement between the appellant and decedent of the matters in controversy. The evidence on the part of the appellee shows that such settlement was made in the year 1870, but the month or time of the year is not stated. The services for which this action was brought were rendered in the year 1870. The evidence of the appellant shows that the decedent, at various times and places, and to different persons, from the year 1870 down to within three weeks of his death, which occurred in May, 1873, admitted that he was indebted to the appellant for and on account of the matters embraced in the cause of action, and claimed to have been included in the settlement, in a sum ranging from three hundred and fifty dollars to four hundred and fifty dollars. The evidence of the settlement came exclusively from the widow and children of the decedent, while the admissions and declarations of the decedent, at times subsequent to such alleged settle-

Denbo v. Wright, Adm'r.

ment, were testified to by persons who had no interest in the suit.

The evidence, as it appears to us upon paper, seems to preponderate in favor of the appellant, but this is not enough to justify a reversal of the judgment. The learned judge who tried the cause possessed many means of determining the credibility of the witnesses, and the weight which should be given to their evidence that we are deprived of.

We have thus far considered the evidence relating to the settlement, upon the theory that it was properly admitted and entitled to consideration by the court; but it is earnestly contended by counsel for appellant, that, under the pleadings in the cause, it was not admissible, because it did not tend to support any issue in the cause.

There was no answer to the complaint, and it is deemed to be controverted as if a denial had been filed. No affirmative matter was admissible. Buskirk Prac. 286, and numerous authorities cited. *Casad v. Holdridge*, 50 Ind. 529.

But it is contended, on the other hand, that as the evidence was admitted without objection, it is to be considered by the court. This is true of evidence which is pertinent to the issue. This rule is illustrated by the evidence of the administrator in the present action. His evidence was pertinent to the issue in the cause, but he was not a competent witness to give such evidence, and as it went in without objection, we have held that the appellant waived his incompetency.

A trial is a judicial examination of the issue joined. Section 317, 2 G. & H. 196; *Casad v. Holdridge*, *supra*. The issue which the court was required to try was, whether the appellant had rendered the services and advanced the money, as alleged in the cause of action. Under that issue, it was competent for the appellee to disprove whatever the plaintiff was required to prove to entitle him to recover, but no affirmative defence could be proved. It was not competent to prove payment, or a settlement, or that the cause of action was barred by the statute of limitations, or that there had

Bacon v. The Western Furniture Company.

been a former recovery. It is settled by three recent decisions of this court, that evidence which is foreign to the issue, and does not tend to prove any fact in issue, should be disregarded, though it was admitted without objection or exception. This is upon the principle that it is wholly immaterial, irrelevant and foreign to the issue in the cause, and should not be considered. *Casad v. Holdridge*, 50 Ind. 529; *Boardman v. Griffin*, 52 Ind. 101; *Town of Cicero v. Clifford*, ante, p. 191.

The cause of action, or some part of it, having been proved, and there being no issue under which a settlement could be proved, the appellant was entitled to a judgment for such sum as he had proved.

The court erred in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded for another trial. in accordance with this opinion.

BACON v. THE WESTERN FURNITURE COMPANY.

LANDLORD AND TENANT.—*Forfeiture*.—Certain real estate being occupied under a written lease reserving rent payable at stated intervals, no place of payment being stated, with a clause of forfeiture upon non-payment of rent as stipulated, the landlord, on a day on which rent became due, but not just before sun-set, at the tenant's place of business, but not on the demised premises, demanded of the tenant the rent due, in general terms, without specifying the amount. The tenant then refused payment, but the next day the rent was paid by the tenant and received and accepted by the landlord, who then gave the tenant notice in writing to quit the premises, which the tenant refused to do.

Held, that the landlord could not recover possession upon the ground of a forfeiture for non-payment of rent upon the day on which it was due.

From the Marion Superior Court.

J. A. Holman, for appellant.

H. Dailey, for appellee.

Bacon v. The Western Furniture Company.

BIDDLE, J.—On the 18th day of April, 1866, Christian Schloer leased certain ground, the right to the possession of which is the controversy in this case, to Hiram S. Rossel, for the term of eight years. The rent reserved was one hundred dollars per year, payable quarterly, commencing on the 17th day of July, 1866, with a clause of forfeiture of the lease upon non-payment of the rent as stipulated.

Under this lease the premises were occupied by the appellee.

On the 13th day of May, 1873, Christian Schloer and his wife sold and conveyed the ground, in fee simple, to the appellant, and assigned to him in writing the lease made to Rossel.

On July 17th, 1873, the day upon which the rent for one quarter became due, at 3 o'clock in the afternoon, the appellant, at the business room of the appellee, but not on the premises leased, demanded, in general terms, the rent due under the lease, the payment of which was then refused. On the next day the rent was paid by the appellee, and received and accepted by the appellant, who, on the same day, gave the appellee notice in writing to quit the premises. Soon afterwards, the precise day does not appear, the appellee refusing to yield possession of the premises, the appellant commenced this action to recover possession, upon the ground that the lease was forfeited for the non-payment of the rent upon the day it was due. The finding and judgment of the superior court, at special term, was for the appellee. The judgment was affirmed at general term. This is right.

Forfeitures are not favored in law. They must be strictly construed. In this case, to entitle the appellant to re-enter and possess the premises, he should have demanded the specific amount of rent due, just before sun-set of the day upon which it became due, and upon the premises leased, there being no place of payment mentioned in the lease. His demand, as shown by the record, was not for any specific amount of rent due, it was not made in the premises leased, nor at the right hour of the day. He has not made out his

Jackson *et al.* v. Reeves.

case. Besides, to insist upon a forfeiture of the lease for the non-payment of the rent, which he has received, seems to us a legal solecism.

The acceptance of the rent, though paid after it was due, was a waiver of his right to enter under the forfeiture. *Philips v. Doe*, 3 Ind. 132; *Meni v. Rathbone*, 21 Ind. 454; *Taylor Landlord and Tenant*, 493; 2 *Platt on Leases*, 233-338, 467-473, and authorities there cited.

The judgment is affirmed, with costs.

JACKSON ET AL. v. REEVES.

CONSTITUTIONAL LAW.—*Title of Act.*—*Liquor Law of 1873.*—Section 12 of the liquor law of 1873 (Acts 1873, Reg. Sess. 151) was not liable to the objection that it was unconstitutional on account of there being more than one subject embraced in the title of the act.

BILL OF EXCEPTIONS.—*Striking Out Pleading.*—To present to the Supreme Court the action of the court below in striking out a paragraph of pleading, the question must be reserved by bill of exceptions.

WITNESS.—*Husband and Wife.*—*Construction of Statute.*—The words "in all cases," in the last sentence of section 18 of said act of 1873, applied to criminal actions only; and on the trial of an action brought by a married woman, under section 12 of said act, to recover damages sustained by her from the intoxication of her husband, caused by the use of intoxicating liquor sold to him by the defendant, said husband was not a competent witness to testify in behalf of his wife.

From the Steuben Circuit Court.

J. A. Woodhull, W. G. Croxton and D. E. Palmer, for appellants.

DOWNEY, J.—This was an action by the appellee against the appellants, under section 12 of the act relating to the sale of intoxicating liquors, approved February 27th, 1873, Acts 1873, p. 151, for damages alleged to have been sus-

Jackson et al. v. Reeves.

tained by her from the intoxication of her husband, by the use of intoxicating liquors sold to him by the defendants.

A demurrer to the complaint was filed by the defendants, and overruled by the court.

The defendants then answered by a general denial and a second paragraph, which latter was struck out, on motion of the plaintiff.

Upon trial by a jury, there was a verdict for the plaintiff for six hundred dollars. A motion for a new trial was made by the defendants, and overruled by the court.

The plaintiff then offered to remit three hundred dollars of the verdict.

The court then rendered judgment for the amount of the verdict, after which the plaintiff remitted three hundred dollars of the amount of the judgment.

The errors properly assigned are:

1. Overruling the demurrer to the complaint.
2. Striking out the second paragraph of the answer.
3. Overruling the motion for a new trial.

Other alleged errors are only grounds for a new trial.

It is urged that the law on which the action is founded is unconstitutional, on account of there being two subjects embraced in the title of the act. We do not concur in this view, but, as the law has been repealed, do not deem it necessary to state our reasons for so holding, at length.

Again, it is urged that the complaint does not sufficiently aver that the plaintiff was the wife of the person to whom the liquor was sold, at the time of the sale. We think this objection is not well taken.

We think there is nothing in the other objections urged against the complaint.

We do not find that the question relating to the striking out of the second paragraph of the answer was reserved by bill of exceptions. That was necessary, in order to present the question to this court. There are many cases to this effect.

Jackson *et al.* v. Reeves.

On the trial of the cause, the husband of the plaintiff was offered as a witness in her favor. The defendants objected to his testifying, because of incompetency. The objection was overruled, and he gave material testimony in the cause.

This action of the court, it is claimed by the appellee, was justified by the last sentence of the eighteenth section of the act on which the action is founded.

The whole section reads as follows:

“Sec. 18. In all prosecutions under this act, by indictment or otherwise, it shall not be necessary to state the kind of liquor sold, or to describe the place where sold, and it shall not be necessary to state the name of the person to whom sold. In all cases, the person or persons to whom intoxicating liquors shall be sold in violation of this act, shall be competent witnesses to prove such facts or any other tending thereto.”

We do not think this section can receive the construction placed upon it. The first part of the section has been adjudged unconstitutional by this court, so far as it attempts to dispense with certain allegations in the indictment, etc. *McLaughlin v. The State*, 45 Ind. 338.

We think, in view of the common law rule, and in view of the legislative policy of the State, by which husband and wife are incompetent witnesses for or against each other, that the last sentence of the section should not be held to render the husband competent to testify for the wife in such a case.

Indeed, we think the whole section should be held to apply to criminal actions only. The section commences with a provision with reference to “prosecutions under this act, by indictment or otherwise;” that is, by indictment, information, or on affidavit. Then follows the sentence in question, which makes provision applicable “in all cases;” that is, as we construe it, all cases before spoken of in the section. For this ruling of the circuit court, the judgment must be reversed.

The Logansport, Crawfordsville and Southwestern R. W. Co. v. Braden.

The judgment is reversed, with costs; and the cause is remanded, with instructions to grant a new trial, and to allow an amendment of the complaint, if requested.

THE LOGANSPORT, CRAWFORDSVILLE AND SOUTHWESTERN RAILWAY CO. v. BRADEN.

EVIDENCE.—*Promissory Note.*—*Justice of the Peace.*—On the trial of an action commenced before a justice of the peace, where there is no answer, the defendant has the benefit of the general denial; and if the action be upon a promissory note, the plaintiff cannot recover if the note be not given in evidence.

From the Montgomery Circuit Court.

R. B. F. Peirce, for appellant.

L. Wallace and *G. D. Henley*, for appellee.

DOWNEY, J.—The appellee sued the appellant on a promissory note, before a justice of the peace, took out an attachment against the property of the company, and a writ of garnishment against one Alba H. Braden.

The plaintiff recovered before the justice of the peace, and had judgment sustaining the attachment and against the garnishee.

Upon trial by the court, on appeal, there was a finding for the plaintiff, as to the issue in the main action, and sustaining the attachment and also the garnishment. A motion for a new trial was made by the defendant, on the grounds that the finding was not sustained by sufficient evidence, and was contrary to law.

The motion was overruled, and there was final judgment for the plaintiff.

Jones v. the State.

The error here assigned is the overruling of the motion for a new trial.

We are not aided by a brief from counsel for the appellee. The evidence is all in the record, and we think it fails to make out the plaintiff's case. The promissory note, on which the action was brought, was not given in evidence. This was necessary.

The defendant had the benefit of the general denial, without pleading it; and that being the case, the note was an essential part of the evidence to sustain the plaintiff's action. *Lucas v. Smith*, 42 Ind. 103, and cases cited.

The evidence was all addressed to the question as to the ground of attachment. That question we need not decide, as the judgment must be reversed for the reason already stated.

The judgment is reversed, with costs, and the cause remanded for a new trial.

JONES v. THE STATE.

CRIMINAL LAW.—*Jurisdiction.*—*Property Stolen in One County Brought into Another.*—An indictment charged, that "at the county of Madison, in the State of Indiana, on," etc., the defendant "did then and there feloniously steal, take and drive away from the said county of Madison, and did then and there feloniously bring into and dispose of in the county of Delaware" (in which the indictment was found) "and State of Indiana, of the personal goods and chattels of," etc., one milch cow, etc.

Held, that the indictment sufficiently described the transfer of the stolen property from Madison to Delaware county, to give jurisdiction to the court in the latter county.

SAME.—*Instructions to Jury.*—On the trial of a criminal action, it is not error for the judge, in charging the jury, to state that witnesses have testified to certain facts, if he also inform the jury that they are the exclusive judges of the facts.

From the Delaware Circuit Court.

Jones v. The State.

T. J. Blount, C. B. Templer, R. S. Gregory and J. N. Templer, for appellant.

C. A. Buskirk, Attorney General, for the State.

PETTIT, J.—This was an indictment for grand larceny, in stealing cattle.

The indictment was in two counts.

1. For stealing the cattle in Delaware county.
2. For stealing the same cattle in Madison county, and bringing them into Delaware county, where the indictment was found.

A motion to quash each count was overruled, and exception taken.

Trial by jury, and verdict of guilty under the second count, which operates as a verdict of not guilty under the first count.

It is urged that the second count of the indictment is bad, and should have been quashed, because it does not properly describe the transfer of the stolen property from Madison to Delaware county, to give the court in the latter county jurisdiction.

Our statute, 2 G. & H. 392, sec. 7, is as follows: “When property taken in one county by burglary, robbery, larceny or embezzlement, has been brought into another county, the jurisdiction is in either county.”

The second paragraph of the indictment is as follows:

“And the grand jurors aforesaid, upon their oath aforesaid, do further present and charge, that, at the county of Madison, in the State of Indiana, on the 19th day of August, A. D., 1875, one Philip Jones did, then and there, feloniously steal, take and drive away from the said county of Madison, and did, then and there, feloniously bring into and dispose of in the county of Delaware and State of Indiana, of the personal goods and chattels of Simeon Prather, one speckled milch cow, of the value of forty dollars, and one white and red spotted milch cow, of the value of thirty dollars, and one red steer, of the value of fifteen dollars, and

Jones v. The State.

one white heifer, of the value of ten dollars, and all being, then and there of the value of ninety-five dollars, and being then and there found, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

We do not think there could have been a stricter compliance with the law than is shown in it. It clearly shows that the property was stolen in Madison county, and was taken by the thief to Delaware county.

It is insisted that the evidence does not warrant the verdict, but after a full examination, we think it does, and that we cannot reverse the judgment on the evidence.

The legality of giving the following instructions is raised and presented:

"7. If the evidence in this cause shows that the property described in the indictment was feloniously stolen on the night of the 19th of August, 1875, and if it shows that on the next day it was seen in the possession of the defendant, and that he claimed it to be his, and sold a part of it, and if the defendant has failed to account for an honest possession of the same, it is a circumstance tending to establish his guilt, and from which the jury may find him guilty, if the allegations of the indictment are proven.

"8. One of the most important questions for you to determine is the identity of the defendant, as being the same person who was seen in the possession of the property on the 20th of August, on the day after it is said to have been stolen.

"9. The State has introduced quite a number of witnesses, who have testified to seeing a person driving the cattle along the road and offering to sell the same. They say that person was the defendant, and give a personal description of the person that they call the defendant. They speak of one means of identity, that he wore thin chin whiskers at the time. On the other hand, the defendant has introduced several witnesses who testify that the defendant, at the time, had no whiskers except a moustache. The defendant himself denies

Grinestaff *et al.* v. The State.

the charge; says he was not the person seen in the possession of the property, that he wore no chin whiskers.

“10. It is your duty to carefully examine all of the evidence bearing upon this point, and from it determine whether the defendant is the person who was seen in possession of, and who sold a part of the property, or not.”

There can be no legal or valid objection on the face of any one of these instructions but the ninth, in stating that evidence had been given on one point, as to the identity of the defendant.

Possibly this might have been error, had not another instruction been given. Our statute, 2 G. & H. 417, sec. 113, is this:

“The judge must charge the jury in writing, when either party requests it, and the charge shall be filed among the papers of the cause. In charging the jury, he must state to them all matters of law which are necessary for their information in giving their verdict. If he presents the facts of the case, he must inform the jury that they are exclusive judges of all questions of fact.”

The court gave this instruction:

“12. You are the exclusive judges of the law and of the facts of this case, and also of the credibility of the witnesses.”

This instruction, under the statute, cured any supposed or possible error in giving the ninth instruction. *Driskill v. The State*, 7 Ind. 338.

There is no error in the record.

The judgment is affirmed, at the costs of the appellant.

GRINESTAFF ET AL. v. THE STATE.

RECOGNIZANCE.—*Statute of Frauds*.—A recognizance in a criminal proceeding, taken in open court and entered on the order book, is not within the statute of frauds, but is valid and binding without the signature or seal of any of the cognizers.

Grinestaff *et al.* v. The State.

SAME.—Evidence.—On the trial of an action upon a forfeited recognizance taken in open court and entered on the order book, it is not necessary to prove that the court required the principal to enter into the recognizance.

SAME.—Fixing Amount.—No other fixing of the amount of bail than specifying it in the recognizance is necessary, when the recognizance is so taken by the court.

From the Washington Circuit Court.

T. L. Collins and *A. B. Collins*, for appellants.

C. A. Buskirk, Attorney General, and *S. B. Voyles*, Prosecuting Attorney, for the State.

WORDEN, C. J.—Grinestaff stood indicted in the court below for murder in the second degree and manslaughter.

On June 18th, 1875, at the June term of the court for that year, the cause was set for trial on the 24th day of the same month; and on the day first above named, Grinestaff and his sureties appeared in open court and entered into a recognizance in the sum of two thousand five hundred dollars, conditioned for his appearance to answer the charge at the time specified.

The recognizance was taken in open court and entered upon the order book, but was not signed by Grinestaff or his sureties.

On the day fixed for the trial, Grinestaff, though called, did not appear, and his sureties being called and required to produce him, failed in this, and thereupon judgment of forfeiture was entered.

This action was brought upon the recognizance. Default as to Grinestaff.

The sureties filed a demurrer to the complaint, for want of sufficient facts, which was overruled, and exception taken.

Issue, trial by the court, finding and judgment for the State. Motion for a new trial overruled, and exception.

The objection urged to the complaint is, that the recognizance is within that portion of the statute of frauds which provides that no action shall be brought "to charge any person, upon any special promise, to answer for the debt,

Grinestaff *et al.* v. The State.

default, or miscarriage of another," unless the promise, etc., shall be in writing, and signed by the party to be charged therewith, etc. 1 G. & H. 348.

It has been settled for more than forty years in Indiana, that a recognizance thus taken in open court and entered upon the order book is valid and binding without either the signature or seal of any of the cognizers. Such recognizance creates a debt of record, and is witnessed only by the record, and not by the signatures or seals of the cognizers.

The decisions upon the point are uniform. *Andress v. The State*, 3 Blackf. 108; *Doe v. Harter*, 2 Ind. 252. *Campbell v. The State*, 18 Ind. 375; *The State v. Elder*, 35 Ind. 368. If such recognizance is within the statute of frauds, this court has been wrong in an unbroken line of decisions, running through a period of nearly half a century. We cannot, in view of the authorities, hold that the recognizance sued upon is within the statute of frauds.

It is claimed that a new trial should have been granted, because the proof did not show that the court required the principal to enter into the recognizance, or fixed the amount thereof. We do not see that it was necessary that the court should have required the principal to enter into the recognizance. The inference is that he was in custody and desired to procure his liberty, and for that purpose proposed to enter, with his sureties, into the recognizance, and that thereupon the court took the same, as it was authorized by statute to do. 2 G. & H. 397, sec. 37.

The court did fix the amount, for that is specified in the recognizance. No other fixing of the amount was necessary in a recognizance thus taken by the court. *McClure v. The State*, 29 Ind. 359.

There is no error in the record.

The judgment is affirmed, with costs, and five per cent. damages.

Carver v. Carver.

CARVER v. CARVER.

PLEADING.—*Variance and Amendment.—Promissory Note.*—Where a complaint on a promissory note alleges it to be payable at a certain period after date, and the copy of the note filed with the complaint shows it to be payable at a certain other period after date, the pleading may be regarded as amended so as to avoid the variance.

Not be full.
gen. in U.S.
Court in Mass

HUSBAND AND WIFE.—*Separate Property of Wife.—Promissory Note.*—A husband cannot, without the consent of his wife, receive payment of a promissory note made payable to her by a third person, for money, which, being her separate property, has been used or borrowed by her husband, or so made payable to her as a gift of the amount thereof from her husband, such note being her separate property.

53 241
139 288

SAME.—*Payment to Husband.*—Where a husband gets possession, without the consent of his wife, of a promissory note made to her by a third person, and being her separate property, payments made to him, while he has such possession, by the maker, will not discharge the note or any part of it, unless said wife subsequently sanction such payment.

SAME.—*Agency of Husband.—Payment.*—Where a married woman has placed in the hands of her husband, for collection, a promissory note, made to her by a third person, and being her separate property, her husband is not thereby authorized to receive payment in anything but money; and other property received by him cannot be applied as payment, unless his wife has authorized it, or afterwards acquiesces in it; and the burden is on the maker seeking such application to prove such authority or agency.

SAME.—*Trust.*—Where a husband causes a promissory note, given in consideration of the sale and conveyance of his real estate, to be made to his wife, though without her knowledge, and delivers it to her, whether as a gift to her (which, in the absence of anything to the contrary, would be inferred), or for the purpose of repaying her for money or other property of her separate estate used by said husband in the purchase of said real estate, she does not hold said note as the trustee of her husband, so as to render valid as against her a payment thereon made to him, but such note is her separate property.

From the Madison Circuit Court.

M. S. Robinson and J. W. Lovett, for appellant.

H. D. Thompson, W. R. Pierse and W. March, for appellee.

DOWNEY, J.—This was an action by the appellee, as payee, against the appellant, as maker of a promissory note

Carver v. Carver.

for nine hundred and eighty-nine dollars and twenty-five cents.

Demurrer to the complaint filed and overruled.

Answer, 1. A general denial.

2. Payment.

3. That the note was made to the plaintiff, in trust for her husband, Ira K. Carver, and was placed in his hands by her consent, and that payment was made to him.

Reply in denial of the second and third paragraphs of the answer.

Trial by a jury, and verdict for the plaintiff for four hundred and one dollars and thirty-three cents.

Motion for a new trial by each party overruled, and judgment on the verdict.

Errors assigned by the appellant:

1. Overruling the demurrer to the complaint.

2. Refusing to grant a new trial.

The appellee assigns, for a cross error, the refusal of the court to grant her a new trial.

The objection made by the appellant to the complaint is, that the note is therein alleged to be payable two years after date, whereas the copy of the note filed shows that it was payable in two years and eight months after date. We do not think there is anything in this position. We should treat the pleading as amended, and the variance as thus avoided. *McDonald v. Yeager*, 42 Ind. 388.

Four grounds are stated in the defendant's motion for a new trial:

1. That the verdict of the jury is contrary to law.

2. It is not sustained by sufficient evidence.

3. That the court erred in permitting Esther J. Carver to detail, in her rebutting evidence, facts and circumstances tending to show the facts alleged in her complaint, as to how the note in suit got out of her possession and went into the possession of the defendant.

4. The court erred in giving to the jury instructions number five, six, seven and eight.

There is nothing in either of the first two reasons for a new trial.

The evidence was quite conflicting on the material points in the case. In such cases this court does not interfere with the judgment in the court below.

There is nothing in the third reason for a new trial, because there does not appear to have been anything improper in allowing the rebutting evidence.

In the third paragraph of the answer, the question was raised as to the ownership of the note, and there had been evidence on the part of the defendant tending to support that paragraph. The evidence in question was designed to meet that evidence, and we think was properly admitted.

In the fifth instruction, the court told the jury, that the note being executed to the wife, it became her property, absolutely, and whether it was given to her for her money or not, that the husband had used or borrowed, it was absolutely hers, and he could not receive payment upon it, either in money or property, without her consent.

This instruction is, probably, not entirely correct. The personal property of the wife, held by her at the time of her marriage, or acquired by her during coverture by descent, devise, or gift, is her separate property. Acts 1853, p. 57, 1 G. & H. 295, note 2.

It has been held, that a claim for the personal services of the wife during coverture is the husband's, and not hers. *Baxter v. Prickett's Adm'r*, 27 Ind. 490. Should she take a promissory note for such indebtedness, or for any other claim, not her separate property, but for something, the ownership of which was his, in law, and not her separate property, it would seem that such note would belong to her husband, and that he might, according to the rules of the common law, receive payment thereof without her consent. We are of the opinion, however, that there was such evidence in this case as showed, either that the note was given to the wife for money of hers, which the husband had used, or that it was made to her as a gift of the amount from the

Carver v. Carver.

husband, and that, in either case, the note, or the money, the indebtedness for which was evidenced by the note, thereby became the separate property of the wife. In its application to the facts of the case, therefore, the instruction was not erroneous.

In the sixth instruction, the court told the jury that if the husband of the plaintiff got possession of the note without her consent, payments made to him by the defendant, while he had such possession, would not discharge the note or any part of it, unless she subsequently sanctioned such payments.

This instruction was correct, in view of the evidence to which we have already referred.

In the seventh instruction, the court said, that although the note was placed in the hands of the husband by the wife for collection, this would not authorize him to receive payment in anything but money; and horses, notes and cattle received of the defendant, by the husband, could not be applied in payment of the note, unless the wife authorized it done, or acquiesced in it after it was done; and the burden was on the defendant to prove such authority or agency. No specific objection to this instruction is pointed out by counsel, and we see none.

So far, then, as the case depends on the errors alleged by the defendant, we think the judgment ought to be affirmed.

Upon the cross-error assigned by the appellee, it is claimed that the judgment should be reversed for the reason, among others, that the court gave certain erroneous instructions to the jury.

The tenth instruction given for the defendant was as follows:

“If you believe, from a preponderance of the evidence, that the note in suit was executed by William Carver to the plaintiff, without her knowledge, and was afterwards delivered to her by Ira K. Carver, and that said note was the consideration of the conveyance of real estate, owned by Ira K. Carver, to William Carver, and that Ira K. Carver procured the note to be executed in the name of his wife, without her knowledge as aforesaid, and afterwards delivered the

Mattler v. Schaffner et ux.

same to her, then, and in that case, the plaintiff in this suit became the trustee of said Ira K. Carver, and any payment of said note, made by the defendant to him, would be valid, as against the plaintiff in this action."

This instruction was clearly erroneous. There was evidence tending to show that Ira K. Carver had used money or means of his wife, which she got from her father, in the purchase of the land, for the price of which, when sold to William Carver, the note was executed and made payable to her, and that the note was made payable to her for the purpose of repaying that amount, or part of it. We think, also, that if the husband had the note made payable to his wife, and delivered it to her, in the absence of anything to the contrary, the proper inference would be that he intended it to be a gift to her, and not to make her a trustee. In either view of the case, the instruction was erroneous.

There may be, and we think there are, other errors in the instructions given by the court at the instance of the defendant, but we do not stop to examine them.

The judgment is reversed, at the costs of the appellant, and the cause remanded for a new trial.

MATTLER v. SCHAFFNER ET UX.

ATTORNEY.—*Proceeding to Disbar.*—*Jurisdiction.*—*Construction of Statute.*—

The provision of the code, section 777, 2 G. & H. 329, that "any court of record may suspend an attorney from practising therein" for causes there stated, means that any court of record *having jurisdiction* may suspend an attorney from practising therein for such causes.

SAME.—*Criminal Circuit Court.*—A court having jurisdiction of criminal actions alone, as the Marion Criminal Circuit Court, cannot suspend an attorney from practice at the suit of a person from whom said attorney has obtained money to pay a fine and costs adjudged against another, which the attorney has not so used and refuses to restore to the plaintiff.

Mattler v. Schaffner et ux.

From the Marion Criminal Circuit Court.

J. S. Harvey, S. A. Huff and J. W. Nichol, for appellant.

BIDDLE, J.—This is a proceeding, on complaint of the appellees, against the appellant, as an attorney, praying that he may be disbarred from the practice of the law.

The charge is, that the appellant obtained money, to the amount of one hundred and seventy-six dollars, from the said Mary Schaffner, under the fraudulent promise that he would pay a certain fine and costs, which had been adjudged against Jacob Schaffner, the husband of Mary; that he never paid said fine and costs, or any part thereof, and refused to restore the money to said Mary on demand; in consequence of which dereliction certain real property belonging to said Mary was sold at a sacrifice, to pay said fine and costs. The appellant was ruled to appear and show cause why he should not be disbarred, as prayed. He appeared and moved to dismiss the cause for want of jurisdiction in the court, it being solely a criminal court, to try the case. His motion was denied, and exception taken. Proceedings were then had, by which he was suspended from practising his profession as an attorney at law in the courts of this State, for the term of five years. Appeal.

Had the Marion Criminal Circuit Court jurisdiction over the subject-matter and the person of the appellant? This is the controlling question in the case.

The proceeding was brought under section 779, 2 G. & H. 329, and jurisdiction over the case claimed under section 777, which enacts, that "any court of record may suspend an attorney from practising therein for any of the following causes;" then follows a statement of the causes. The Marion Criminal Circuit Court was established by the act of December 20th, 1865, 3 Ind. Stat. 172, section second of which enacts, that it "shall be open, at all times, for criminal trials, and shall try criminal actions alone, as provided by law for criminal circuit courts." The charge against the appellant is not a "criminal action" of any kind. It does

Mattler v. Schaffner et ux.

not amount to a crime or misdemeanor, or an offence of any kind, which could be prosecuted criminally, either by indictment, information, affidavit, summarily, or in any form or manner known to the criminal law.

It is a well settled principle, that inferior courts have no jurisdiction, except such as is expressly granted or necessarily implied, and which must be strictly construed. *White v. Conover*, 5 Blackf. 462; *Mossman v. Forrest*, 27 Ind. 233; *English v. Smock*, 34 Ind. 115. The law governing the jurisdiction of superior and inferior courts was most happily stated in *Peacock v. Bell*, 1 Saund. 73, and approved by this court in *The Board of Commissioners, etc., v. Markle*, 46 Ind. 96, in the following words:

“That nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.”

Our criminal courts have been held to be inferior courts, under the constitution, in the same sense as the courts of common pleas are so held. *Clem v. The State*, 33 Ind. 418. In the case of *The State, ex rel. Wildman, v. The Board, etc.*, 49 Ind. 457, this court held the words, “in any court in this State,” as used in a statute, to mean, “in any court in this State having jurisdiction.”

So we must hold the words used in section 777, 2 G. & H. 329, that “any court of record may suspend an attorney from practising therein for any of the following causes,” to mean that any court of record having jurisdiction may, etc.; and we cannot look to this section to ascertain the jurisdiction of the Marion Criminal Circuit Court, for the later act, which creates it, expressly declares that it “shall try criminal actions alone.” This prosecution not being a criminal action, it follows that the Marion Criminal Circuit Court had no jurisdiction; and it having no jurisdiction, the proceedings are *coram non judice* and void. *Taylor v. Con-*

Conover *et al.* v. Stringer.

ner, 7 Ind. 115; *Reams v. The State*, 23 Ind. 111; *English v. Smock*, 34 Ind. 115.

Doubtless, the Marion Criminal Circuit Court has the inherent power, incident to all courts of record, to punish for contempts towards itself, its process or authority, and to fully protect itself in the exercise of its judicial power, by fine, costs, and imprisonment, and, possibly, in an extreme case, might disbar an attorney for gross misconduct from practising his profession before it, even without an express statute; but such power or authority is clearly distinguishable from the proceeding before us, which is not in the form of a state prosecution, by making the State the prosecuting plaintiff, but is in the name of a private person, whereby the attorney, for general misconduct in his duty, not particularly towards the court, its process, or authority, may be suspended from practice in any of the courts of the State, and which may result in the recovery of a money judgment against the attorney, and in favor of the complaining party.

The judgment is reversed; cause remanded, with instruction to dismiss the proceeding.

CONOVER ET AL. v. STRINGER.

WILL.—*Fee Simple Reduced by Subsequent Clause.*—An estate in fee simple given by a will may, by a subsequent clause of the will, be cut down to a life estate.

SAME.—*Construction.*—At the time of the execution of a will, and at the death of the testator, he had a wife and three children living, and there were living the widow and children of a deceased son of the testator. In the will, the testator directed that all his property, both real and personal, should be and remain the absolute property of his said wife, if she should be living at the time of his death, except the money that he had on hand and at interest. After certain bequests of such money, he directed that the balance thereof should be divided equally between his lawful heirs, naming as such his said three living children and his said deceased son “or his heirs.” He then directed that the balance of his

Conover *et al.* v. Stringer.

estate, both real and personal, should be equally divided between his "four above named heirs," after the decease of his wife, and that if any of his said heirs should die leaving heirs, they should be entitled to the share of their respective ancestors, as if then living. Suit by said widow of said deceased son for partition of the real estate of the testator, the widow of the testator and the children of said deceased son being dead. *Held*, that the petitioner was the owner of one-fourth of said real estate.

From the Shelby Circuit Court.

K. M. Hord and *A. Blair*, for appellants.

C. W. Snow and *T. W. Woollen*, for appellee.

DOWNEY, J.—This was a petition for the partition of real estate, by the appellee against the appellants.

The defendants demurred to the petition, which was adjudged sufficient; and thereupon there was judgment for partition, which was made, reported and confirmed.

The ruling of the court on the demurrer is assigned as error.

The whole case turns upon the construction of the will of John B. Conover, deceased. The testator had four children, Obadiah Conover, John Baird Conover, Samuel Pitney Conover and Nelson Schenck Conover. On the 15th day of June, 1854, as alleged in the petition, said Samuel Pitney Conover died, leaving his widow, the appellee, and three children, Cordelia, John J. and Mary E., surviving him. The will was made and bears date July 8th, 1859, after the death of the son Samuel Pitney. At the date of the will, the family of the testator consisted of his widow, Eliza Conover, Obadiah Conover, John Baird Conover, the widow and three children of Samuel Pitney Conover, deceased, and Nelson Schenck Conover.

The will, so far as material, is as follows:

"I, John B. Conover, of Shelby County, and State of Indiana, do make and publish this, my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made.

"First. I direct that all my just debts and funeral expenses be paid, as soon after my decease as possible, out of the first

Conover et al. v. Stringer.

moneys that shall come to the hands of my executors from any portion of my estate, real or personal. I also direct, that all my property, both real and personal, shall be and remain the absolute property of my beloved wife, if she shall be living at the time of my decease, except the money that I have on hand and at interest.

“I bequeath to Sarah Ann Conover, the daughter of Obadiah Conover, one hundred dollars, out of the money on hand or at interest.

“I also bequeath to Garrett Ferman Conover, son of Obadiah Conover, one hundred dollars, out of the money on hand or at interest. And also one hundred dollars each, after the death of my beloved wife Eliza Conover; and the balance of the money that is on hand or at interest I want divided equally between my lawful heirs, viz.: Obadiah Conover, John Baird Conover, Samuel Pitney Conover, or his heirs, and Nelson Schenck Conover.

“I also direct that the balance of my estate, both real and personal, be equally divided between my four above named heirs, after the decease of my wife, Eliza Conover; the property to be divided, or sold at public or private sale, as my said executors think best, and divided equally between my four above named heirs, share and share alike; and if any of said heirs shall die, leaving heirs, they shall be entitled to the share of their respective ancestors, as if then living.”

After the decease of the testator, the three children of said Samuel Pitney Conover died, leaving their mother, said appellee, surviving them. She married again, which accounts for her change of name. The widow of the testator was dead, when this action was commenced. The appellee, petitioner below, claimed to be the owner of one-fourth of the real estate, and her claim was sustained by the circuit court.

Thus, the proper construction of the will becomes material.

It is claimed by the appellants, that Eliza Conover, the widow of the testator, took a fee simple in the land, and that

Ihinger v. The State.

any subsequent limitation thereon would be hostile to the nature and intention of the gift, and therefore void.

Counsel for appellants refer to *Oxley v. Lane*, 35 N. Y. 340; *Andrews v. Spurlin*, 35 Ind. 262; *Doe v. Jackman*, 5 Ind. 283; and *Spurgeon v. Scheible*, 43 Ind. 216; and they claim that, in accordance with the rule recognized in these cases, the widow of the testator took a fee simple.

Had the instrument by which the estate was conveyed been a deed, and not a will, there might have been more reason for the position assumed by the appellants. But we have no doubt that, in a will, an estate in fee, given by a clause of the will, may be cut down to a life estate by a subsequent clause. *Norris v. Beyea*, 3 Kern. 273. The two clauses being irreconcilable, the latter modifies or controls the former.

The son of the testator, Samuel Pitney, being dead when the will was made, we think it clear that the testator intended, by the addition of the words "or his heirs," to vest in his children, or his widow and children, which is immaterial, so far as this case is concerned, an equal share of the estate with the other children.

We are of the opinion that the construction put upon the will by the circuit court is correct.

The judgment is affirmed, with costs.

IHINGER v. THE STATE.

EVIDENCE.—*Age.*—*Personal Appearance Before Jury.*—The appearance of a person in respect to his age, as seen by the court or jury, cannot be considered as evidence.

SAME.—*Selling Liquor to Minor.*—*Instruction to Jury.*—On the trial of a prosecution for selling intoxicating liquor to a minor, it was not permissible for the jury to look at the personal appearance as to age of the alleged

Ihinger v. The State.

minor, who had testified as a witness in their presence, and to regard such inspection, either with or without competent evidence of his age, in determining whether or not the defendant acted in good faith in selling him the liquor.

From the Delaware Circuit Court.

J. N. Templer and *R. S. Gregory*, for appellant.

C. A. Buskirk, Attorney General, for the State.

WORDEN, C. J.—Prosecution for selling intoxicating liquor to a minor; trial by jury; verdict and judgment for the State; motion for a new trial overruled, and exception.

On the trial, Ephraim Carmichael, the person to whom the liquor was alleged to have been sold, testified that he was eighteen years old, about six feet high, and weighed one hundred and seventy-five pounds; other than this there was no evidence given to the jury in respect to his personal appearance as to age or otherwise.

The court instructed the jury, amongst other things, as follows:

“The mere fact that a minor represents himself to be twenty-one years old, is not of itself sufficient to excuse the sale. A mere child might make such representation, yet any person of common sense would know the statement to be untrue. The real question is, whether the defendant in making the sale” [acted] “in good faith.

“1. Did the defendant use reasonable caution in making the sale?

“2. Was the witness’s personal appearance such as would indicate that he was twenty-one years old?

“In determining this question, you should look at his entire personal appearance; first, his size; second, the appearance of his face. Did he have a beard or not, together with his whole general appearance, should be regarded by the jury in determining the question of good faith on the part of the defendant.”

The phraseology of the charge carried the idea that the jury were to consider the appearance of Carmichael in

Ihinger v. The State.

respect to his age, as they viewed him, and not from evidence given as to his appearance. This construction of the charge is strengthened by the fact that the court mentioned particulars in respect to the appearance of the witness, as the presence or absence of a beard, about which no evidence was given whatever.

Was it competent for the jury thus to look upon Carmichael, and from such inspection of him, either with or without other evidence of his age, determine whether or not the defendant acted in good faith in selling him the liquor? We think not. Whether or not the defendant acted in good faith depended upon whether he had reasonable ground to believe, and did believe, that Carmichael was twenty-one years of age. This might have depended, in part at least, upon the appearance of the latter as to age. And, doubtless, evidence would have been competent to show the appearance of the witness as to age. But we know of no principle of law that would permit the jury to pass upon the age of the witness by his appearance to them. There is no mode of putting such evidence upon the record in order that it may be passed upon by an appellate tribunal. On a motion for a new trial in the court below, the judge would have to substitute his impressions, as to the appearance of the witness as to age, for those of the jury.

The cause is identical, in principle, with that of *Stephenson v. The State*, 28 Ind. 272. There, it was charged, that Stephenson, being over fourteen years of age, broke the Sabbath by following his usual occupation on that day. The cause was tried by the court, and the defendant found guilty. There was no evidence given as to the age of the defendant, but the judge certified that the accused, who was present in the court at the trial, presented the appearance of a full grown man. The judgment was reversed for want of competent evidence of the defendant's age. The decision in that case is quite satisfactory, and is decisive of the present.

The charge having been duly excepted to, and assigned

 Bender v. The State.

as one of the causes for a new trial, the judgment below will have to be reversed.

The judgment below is reversed, and the cause remanded for a new trial.

BENDER v. THE STATE.

53	254
138	671
53	254
140	513
141	283

CONSTITUTIONAL LAW. — *Passage of Statute. — Limit of Judicial Inquiry.*—

Courts of this State cannot look beyond the enrolled act of the legislature, to ascertain whether there has been a compliance with the requirement of the constitution, that “no bill shall be presented to the governor within two days next previous to the final adjournment of the General Assembly.”

From the Fountain Circuit Court.

H. H. Dochterman, for appellant.

C. A. Buskirk, Attorney General, and *T. L. Stilwell*, Prosecuting Attorney, for the State.

BUSKIRK, J.—The record in this cause presents for decision but one question, and that arises in two ways; first, by an answer setting up the facts, to which a demurrer was sustained; and secondly, by an agreed statement of facts, upon which the cause was tried.

The appellant was indicted for selling intoxicating liquor to a minor. The prosecution was based upon the act of March 17th, 1875.

It is very earnestly insisted, that such pretended act was not passed in conformity to the imperative requirements of the constitution, in this, that it was passed on the 13th day of March, 1875, and that the legislature finally adjourned on the 15th day of said month, and therefore, that it was not, and could not have been, presented to the governor within the time prescribed by the constitution.

The last clause of section 14 of article 5 provides:

Bender v. The State.

“But no bill shall be presented to the governor within two days next previous to the final adjournment of the General Assembly.”

It appears upon the face of the act that it was approved on the 17th day of March, 1875, but it does not appear therefrom when it was passed, when it was presented to the governor, or when the final adjournment of the General Assembly took place. These facts are averred in the answer and admitted in the agreed statement of facts, and the question which we are required to decide is, whether the court below possessed the power to look beyond the enrolled act, to ascertain whether it had been passed in conformity to the constitution.

Counsel for appellant has filed a very able and elaborate brief, in which the following proposition is stated and argued:

“Courts have the power to go behind the statute and enquire whether or not the act was passed according to the constitution, and if not, to declare it void, just the same as if it appeared upon the face of the act that it conflicted with the provisions of the constitution.”

Several adjudged cases are cited in support of such position, but we do not deem it necessary to cite or review them, because they are cited and reviewed in the case of *Evans v. Browne*, 30 Ind. 514, where the previous Indiana cases cited are overruled, and the others are disapproved of, and where a rule is laid down which is in direct conflict with the above proposition. The ruling in the above case has been approved and adhered to. *Van Dorn v. Bodley*, 38 Ind. 402; *Turbeville v. The State*, 42 Ind. 490. The ruling in *Evans v. Browne*, *supra*, seems to be in accordance with the weight of authority, and we regard the question as settled and will not open it.

The ruling of the court below having been in strict accordance with such ruling, it results that the judgment must be affirmed.

The judgment is affirmed, at the costs of the appellant.

Wheat v. Hamilton.

WHEAT v. HAMILTON.

CONTRACT.—*Purchase of Partnership Interest.*—*Assuming Liabilities.*—*Taxes.*

One member of a firm sold his interest in the partnership to one who, by the terms of the contract, agreed to pay a certain sum to said member and to take his place in said firm and to pay his share of the debts and liabilities of said firm, said member at the time of the sale exhibiting to said purchaser a written statement purporting to contain a showing of the liabilities of the firm, nothing being said about taxes in said written statement or orally.

Held, that said purchaser was bound for the payment of the retiring member's share of state and county taxes assessed against the firm at the time of the sale.

From the Johnson Circuit Court.

G. M. Overstreet and *A. B. Hunter*, for appellant.

S. P. Oyler, for appellee.

WORDEN, C. J.—This was an action by Hamilton against Wheat, to recover the sum of seventy-seven dollars and thirty-four cents, on facts that need not be here stated, as they are embodied in the special finding of the court hereinafter set out.

The cause having been submitted to the court for trial, the court, at the request of the defendant, made the following special finding of the facts, viz.:

“That upon the 23d day of April, 1873, the plaintiff, Robert Hamilton, was in partnership with one Thomas Branigin and J. H. Featheringill, under the firm name of J. H. Featheringill & Company; that said firm were the owners of a large amount of hog product, consisting of shoulders, sides, etc.; that the hogs out of and from which said product had been manufactured had been purchased by said firm, and slaughtered and packed by the firm of Herriott, Vawter & Company, of which firm the defendant, William Wheat, was a member; that advances had been made upon said product by said firm of Herriott, Vawter & Company to said firm of J. H. Featheringill & Co., part of which had been paid by the sale of hams, lard, etc.,

Wheat v. Hamilton.

the product of said hogs; that there were debts due from J. H. Featheringill & Co. to Herriott, Vawter & Co., to the banks in Franklin, to said Featheringill and Branigin, for moneys advanced for the purchase of said hogs, and that there was the sum of two hundred and thirty-two dollars state and county taxes assessed upon said hog product in the year 1873; that upon the 23d of April, 1873, the defendant, William Wheat, bought of and from plaintiff, Robert Hamilton, his, Hamilton's, entire interest in said firm, agreeing and contracting with Hamilton to pay him five thousand dollars profit, to take his, said Hamilton's, place in said firm, and to pay his share of the liabilities and debts of said firm; that at the time of sale, a written statement was exhibited by Hamilton to Wheat, purporting to contain a showing of the liabilities of Featheringill & Co., in which statement nothing was said as to the interest on advances made by Herriott, Vawter & Co., insurance or taxes, and nothing was said orally about the taxes, interest or insurance, by either of them; and Wheat paid to Hamilton the sum of five thousand dollars, and has since paid all the share of Hamilton, in the debts and liabilities of the firm, except the state and county taxes, amounting to seventy-seven dollars and thirty-four cents, which was paid by Robert Hamilton, upon the 23d day of April, 1874, and demanded of the defendant before the commencement of this action."

The court concluded, on the facts found, that the plaintiff was entitled to recover the amount thus paid by him for taxes, and rendered judgment accordingly. The defendant excepted to the conclusion, and error is here assigned upon it. This presents the only question raised here.

We are of opinion that the conclusion of the court was right. By the terms of the contract, as found by the court, Wheat was to take Hamilton's place in the firm, and "pay his share of the liabilities and debts of said firm." Taxes against the firm were certainly liabilities. At the time of the contract, Hamilton exhibited to Wheat a written state-

The Indianapolis Piano Manufacturing Co. *et al.* v. Caven.

ment, purporting to contain a showing of the liabilities of the firm. But the contract was not that Wheat would pay Hamilton's share of the liabilities thus exhibited. It was to pay Hamilton's share of the liabilities and debts of the firm, whatever they might be. The paper, so far as we can gather from the finding of the court, cannot be construed into a warranty that there were no other debts or liabilities against the firm, nor is any fraud found in the transaction.

It is objected by the appellant, that it does not appear against whom the taxes were assessed. It is not found in terms that they were assessed against the firm of J. H. Featheringill & Co., but this is fairly to be inferred from what is found. It is found that, on the 23d of April, 1873, the firm were the owners of the hog product, and "that there was the sum of two hundred and thirty-two dollars state and county taxes assessed upon said hog product in the year 1873," and, further, that Wheat "has since paid all the share of Hamilton in the debts and liabilities of the firm, except the state and county taxes."

We do not see how the taxes could be classed amongst the debts and liabilities of the firm, unless the assessment, when made, was made against the firm.

The judgment below is affirmed, with costs.

THE INDIANAPOLIS PIANO MANUFACTURING CO. ET AL.
v. CAVEN.

PROMISSORY NOTE. — *Payable in Bank. — Locality of Bank Not Stated.* —

Where a promissory note is made in this State, payable at a bank named, the locality of the bank not being stated, in an action on the note in a court of this State, the bank will be presumed to be located in this State, unless the contrary appears, and, therefore, on demurrer to the complaint, the note will be regarded as negotiable by the law merchant.

PRACTICE. — *Pleading. — Striking Out Relevant Matter.* — In an action on a

53	258
139	124
53	258
143	509
53	258
146	670
53	258
164	223
164	224

The Indianapolis Piano Manufacturing Co. *et al.* v. Caven.

promissory note stipulating for ten per cent. attorney's fees if suit should be instituted thereon, an allegation in an answer, that such stipulation was intended to enable the plaintiff to receive usurious rates of interest on the note was relevant and pertinent, as tending to constitute a defence as to a part of the plaintiff's claim, and it was therefore error, whether the matter was well pleaded or not, to strike such allegation out on motion; and where, by such striking out, the defendant was deprived of the right, which he otherwise would have had, to introduce evidence of the fact so alleged, such error could not be regarded as harmless.

SAME.—*Trial in Absence of Defendant.*—Where a cause at issue has been reached for trial, and the defendant and his attorney are absent, it may be submitted to the court for trial of the issues joined, without the intervention of a jury, without calling the defendant.

SAME.—*Relief from Neglect, etc.*—Prior to the adjournment of a court for a holiday recess, an attorney for the defendant in a cause, which he knew was the next cause for trial, informed the court, in the hearing of the plaintiff's counsel, that he would be absent during the recess, and could not return until an hour after the usual time for the meeting of the court; and upon the meeting of the court, pursuant to adjournment, the defendant and his attorney being absent, the court required that said cause be tried or passed; and the plaintiff's attorney having notified the resident partner of said defendant's attorney that said cause had been called for trial, and said partner, who, as was afterwards shown, was not prepared in said cause, having refused to appear, the plaintiff's attorney submitted the cause to the court for trial; and said defendant's attorney, upon his arrival at the hour so announced by him, found that the cause had been tried, and that a finding had been rendered for the plaintiff.

Held, upon affidavits showing these facts and a partial defence, that the defendant was not entitled to any relief.

From the Marion Civil Circuit Court.

J. Hanna and F. Knefler, for appellants.

J. N. Sweetzer, J. W. Gordon, T. M. Browne and R. N. Lamb, for appellee.

WORDEN, C. J.—The appellee sued the appellants upon the following promissory note, viz.:

"\$1,681.76.

INDIANAPOLIS, Oct. 9th, 1871.

"Six months after date, we promise to pay to the order of John Caven, sixteen hundred and eighty-one and seventy-six hundredths dollars; ten per cent. attorney's fees, if suit be instituted on this note. Negotiable and payable at Fletch-

The Indianapolis Piano Manufacturing Co. *et al.* v. Caven.

er's Bank, value received, without any relief whatever from valuation or appraisement laws, with interest at twelve per cent. per annum after maturity. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note.

“INDIANAPOLIS PIANO M’F’G Co.,

“By W. J. H. ROBINSON, Pres’t.”

Endorsed as follows: “W. J. H. Robinson, J. C. Geisendorff, C. E. Geisendorff & Co.”

There were three paragraphs in the complaint. The first charged that those who placed their names upon the back of the note intended thereby to become makers thereof, and to assume a primary liability thereon. The second charged them as endorsers, and the third as “guarantors, sureties and endorsers” for the manufacturing company.

A demurrer to the complaint, for want of sufficient facts, was overruled, and exception taken.

The defendants answered :

1. General denial.
2. Payment.
3. The payment of usurious interest, which is sought to be recouped.
4. “That said note, upon its face, shows that he, said plaintiff, charges illegal and usurious rates of interest, in this, *that the said sum of ten per cent. for attorney’s fees is unreasonable, illegal and usurious, and was intended to enable the plaintiff to have and receive usurious rates of interest on said note; that said rate of ten per cent. for attorney’s fees is double the usual and just sum allowed and obtained by law; and, further, that said note, upon its face, bears interest at the rate of twelve per cent., a rate illegal and usurious. Wherefore the defendants pray that, as to the illegal interest, to wit, all over ten per cent., and as to said attorney’s fees, all over the rate of five per cent., they may have judgment; and as to the residue of said note, they deny the same.*”

On motion of the plaintiff, the court struck out the words

The Indianapolis Piano Manufacturing Co. *et al.* v. Caven.

in italics in the above paragraph, and the defendants excepted. The paragraph, after it had been thus cut down, was held good on demurrer.

The plaintiff replied in denial of the second, third and fourth paragraphs of the answer, and the issues thus formed were, in the absence of the defendants and their attorneys, but when the cause had been regularly reached in its order for trial, submitted to the court for trial, resulting in a finding and judgment for the plaintiff, for the sum of two thousand one hundred and sixty-nine dollars and eighty-one cents.

Errors are assigned upon the rulings of the court, amongst other things, in overruling the demurrer to the complaint, and in striking out the part indicated of the fourth paragraph of the answer.

The objection urged to the complaint, as we understand from the brief of counsel, is, that the note sued upon, being payable at "Fletcher's Bank" merely, without any designation of its locality, is not governed by the law merchant, and, therefore, that the endorsers cannot be sued until the maker has been prosecuted to insolvency, etc. This objection has no application to the first paragraph, which charges all the parties as makers, and perhaps not to the third, but it applies to the second.

But the objection is not, in our opinion, well taken. All notes payable to order or bearer in a bank in this State are governed by the law merchant. The bank, in this instance, is specified, Fletcher's Bank. But the locality is not specified.

It is well settled, that a contract sued upon in the courts of this State will be presumed to have been made here, unless it appears to have been made elsewhere. *Rose v. The Thames Bank*, 15 Ind. 292, and authorities there cited. So, we think that where a note is made in Indiana and payable at a named bank, without designating its locality, it will be presumed to be located in Indiana, unless the contrary appears. When such a note is made here, payable at

The Indianapolis Piano Manufacturing Co. *et al.* v. Caven.

a bank, it will be presumed to be payable in the State, rather than out of it.

There was no error in overruling the demurrer to the complaint. But, in our opinion, the court committed a fatal error in striking out the matter in the fourth paragraph of the answer. There can be no doubt that if the stipulation in the note in relation to attorney's fees was intended by the parties to enable the plaintiff to receive usurious rates of interest on the note, that fact would reduce the amount to be recovered as attorney's fees, or possibly defeat the claim for such fees altogether. The question is not whether the matter was well pleaded, but whether it was relevant and pertinent.

In *Port v. Williams*, 6 Ind. 219, the court said, in relation to striking out:

"A motion to strike out does not perform the office of a demurrer, either under the old or new practice. Whether it" (the matter struck out) "was a sufficient defence to bar the action was wholly immaterial. It was, at least, such pertinent matter as the court ought not to strike out on motion."

To the same effect are the cases of *Williams v. Port*, 9 Ind. 551; *Skeen v. Muir*, 34 Ind. 310; and *Clark v. The Jeffersonville, etc., R. R. Co.*, 44 Ind. 248. In the latter case, the New York authorities are collected, from which the proposition is deduced, that the true test of the materiality of the averments sought to be struck out is to inquire whether such averments tend to constitute a cause of action or defence; and if they do, they are not irrelevant.

The paragraph was held good on demurrer, as has been stated, after the elision, but that did not enable the defendants to avail themselves of the usury which they attempted to set up in the paragraph. Indeed, after the elision, there does not appear to have been any substance left to the paragraph, unless the denial of the "residue of the note" be regarded as substance. The counsel for the appellee argue that the appellants were not injured by the ruling, because the paragraph was held good after the elision, and because

The Indianapolis Piano Manufacturing Co. *et al.* v. Caven.

they offered no proof under it. After the emasculation of the paragraph, there was no allegation of any new affirmative fact left, under which they could offer proof. What was said in the paragraph about the rate of interest stipulated for already appeared upon the face of the note, and was no new matter.

The striking out of the matter deprived the appellants of the right to introduce evidence which they might have offered had the matter not been struck out, and therefore injured them. The effect of the error in striking out will be considered further before closing this opinion.

As has been stated, when the cause was reached in its order for trial, neither the defendants nor their attorneys appearing, the cause was submitted to the court for trial of the issues joined. This is complained of as error. The failure of the defendants to appear upon the trial did not operate to withdraw their pleadings. The issues joined had to be tried and found for the plaintiff, before he became entitled to judgment. The appellants claim, as we gather from their brief, that it was irregular thus to submit the cause for trial, without having called and defaulted them, and that they had not in any manner waived their right to a trial by jury. The defendants could not have been defaulted as long as their pleadings were on file, and there was no error in proceeding with the trial without the formality of calling them. The cause was properly submitted to the court for trial without the intervention of a jury. The statute is express, that the trial by jury may be waived by the parties in all actions, by failing to appear at the trial. 2 G. & H. 207, sec. 340.

The appellants moved for a new trial, on the ground that the damages were excessive, and on another, which, if it entitled them to relief at all, would fall more properly under the provisions of the ninety-ninth section of the code as amended. See *Packer v. Burt*, 51 Ind. 588. We will proceed, however, to consider it.

The affidavit of one of the appellants was filed, showing a

The Indianapolis Piano Manufacturing Co. *et al.* v. Caven.

partial defence. The affidavit of John Hanna, one of the attorneys for the defendant, was also filed, stating, in substance, that he had had the sole and exclusive management of the defence; that his partner had taken no part therein, and was wholly unadvised as to the defence or the proof to be offered in support thereof; that another cause had been on trial for some days in that court, and was given to the jury late in the evening of Dec. 31st, 1873; and thereupon the court announced that no court would be held on January 1st, 1874, for the trial of any causes; that the affiant residing at Greencastle, and desiring to spend New Year's day with his family, he announced to the court, and in the hearing of the counsel for the plaintiff, that he would go home on that night's train, and return on the morning train on the 2d of January, which regularly arrived at about 10 o'clock; that before the adjournment of the court on the evening of December 31st, he enquired of the court whether this cause would be the next cause for trial, and was informed that it would, as it stood next in order on the trial docket; and he thereupon said to the court that he would go home that night and return on the morning after New Year's, and that his train would get here at 10 o'clock, A. M., and that he would advise his clients to try the cause without a jury, and if they assented, he did not think it would take long to try it; that he went home, and returned on the morning of January 2d, and arrived at the court-house within a very few minutes after 10 o'clock, and was surprised to learn that in his absence, and in the absence of his clients, the cause had been submitted to the court, the plaintiff's evidence heard, and a finding rendered for the plaintiff; that immediately on learning these facts he called the attention of the court to the matter, and desired to offer evidence in support of the defence, which, the plaintiff objecting, the court declined to hear; that if he had had any reason to believe that the cause would be taken up before 10 o'clock, he would not have gone home, but would have remained and been present at the opening of the court at 9 o'clock; that it was not by

The Indianapolis Piano Manufacturing Co. *et al.* v. Caven.

reason of any fault or negligence of his clients that the cause was tried in his and their absence ; that he believes his clients have a just and legal defence to a part of the claim.

We have condensed this affidavit, but believe the foregoing statement contains all of it that is material.

The appellee, the plaintiff below, filed the affidavit of Jonathan W. Gordon, one of the counsel for the plaintiff, stating, in substance, that when the cause was called for trial, on January 2d, 1874, and before entering upon the trial, he sent a messenger to the office of Hanna & Knefler, attorneys for defendants, to notify them that the cause was called for trial ; and in response to said notice, General Knefler sent word into the court room to affiant, that he would not come ; that he has since been informed that Knefler refused to come because he had not studied the case and was not prepared to try it ; that the affiant was unwilling to try the cause until the appellants' counsel should arrive, but was given to understand by the court that the cause had to be tried then or passed, and if passed it would not likely be called again at that term ; that it was not until he was so informed, as he then understood, that he consented to go on with the trial.

It will be observed that Mr. Hanna knew that the cause was the first standing on the docket for trial on the morning of January 2d, 1874. He informed the court, on the evening of December 31st, that he was going home that night, and would return at about 10 o'clock on the morning of January 2d ; and this was said in presence of counsel for the plaintiff ; but it does not appear that the court stated to him, or that the counsel for the plaintiff agreed with him, that the cause should not be taken up before he returned. When he announced his purpose of going home, both the court and the counsel for the plaintiff may have well supposed that if he did not return before the cause was called for trial, his partner, General Knefler, would be present to go on with it. No advantage was sought to be taken by the plaintiff of the absence of Mr. Hanna. When the cause was called in its

The Indianapolis Piano Manufacturing Co. *et al.* v. Caven.

order for trial, the plaintiff was required to go on with it, or it would be passed. In this there was no error; nor do we see that the discretion of the court has been abused. There is nothing in the affidavits that, in our opinion, entitles the appellants to any relief. *Packer v. Burt, supra.*

We recur again to the error committed in striking out the part of the fourth paragraph of the answer. If the appellants can be restored to all they lost in consequence of the error, they require nothing further. What they claimed under the matter struck out was a reduction of one-half the amount stipulated for as attorney's fees, reducing the same to five per cent. Five per cent., or one-half the amount stipulated for as attorney's fees, is all that could have been avoided under the pleading as it was framed, had the matter not been struck out. The legal effect of the note was to pay interest at the rate of ten per cent. per annum after maturity. *Yancy v. Teter*, 39 Ind. 305. The appellee, in the brief of his counsel, has offered to remit any amount in excess of what this court shall think he had a right to recover.

There was due on the note for principal and interest, at the date of the judgment, computing the interest from the maturity of the note, April 12th, 1872, the end of grace, the sum of one thousand nine hundred and seventy-one dollars and twenty-six cents, as we compute the interest, to which add five per cent. on that amount for attorney's fees, and we have the sum of two thousand and sixty-nine dollars and eighty-two cents as the amount due the plaintiff after making the deduction above mentioned. If the appellee shall remit, within sixty days, all of the judgment below, except the sum last above stated, and the costs below, as of the date of the judgment below, the judgment for the residue and for costs below will be affirmed, at the costs in this court of the appellee. Otherwise, the judgment below will be reversed, at the costs of the appellee, and the cause remanded for further proceedings.

Modlin *et ux.* v. Kennedy *et al.*

MODLIN ET UX. v. KENNEDY ET AL.

WILL.—Construction.—Life Estate.—A testator in his will directed that the whole of his personal property should be and remain the absolute property of his wife, if she should be living at the time of his decease; and he then directed that all his real estate should be and remain the absolute property of his wife, “as long as she lives.”

Held, that, as to the land, the widow took only a life estate.

WASTE.—Growing Trees.—For a tenant for life to sell and authorize the cutting and removal of valuable timber trees growing on the land constitutes waste. -

From the Clinton Circuit Court.

J. N. Sims, for appellants.

J. V. Kent and *L. McClurg*, for appellees.

DOWNEY, J.—This was a complaint in chancery by the appellants against the appellees, to restrain the commission of waste.

William H. Kennedy was the owner in fee of certain real estate. He died testate, leaving a widow, Jane Kennedy, one of the defendants, and ten children, surviving him. The widow claimed that by the will she was owner in fee of the land, and had sold to her co-defendants, and they were cutting and removing, and intending to cut and remove, valuable timber trees from the land, manufacturing them into staves and selling the same. The female plaintiff is one of the daughters of the deceased, and the other plaintiff is her husband.

The main question in the case depends upon the proper construction of the will of the deceased. The will is short, and we copy it. It is as follows:

“I, William H. Kennedy, of Clinton county, in the State of Indiana, do make and publish this my last will and testament. First, I direct that my body be decently interred; and as to my worldly estate, as it has pleased God to intrust me with, I dispose of the same in the following manner, to wit: I direct, first, that all my just debts and funeral expenses be paid, as soon after my decease as possible, out of

Modlin et ux. v. Kennedy et al.

the first moneys that shall come into the hands of my executrix from any portion of my personal estate, as my executrix may see proper to dispose of to pay the same. I also direct that the whole of my personal property shall be and remain the absolute property of my beloved wife, if she shall be living at the time of my decease. I also direct that all my real estate shall be and remain the absolute property of my beloved wife, as long as she lives. * * * In witness whereof," etc.

We think it quite clear that only a life estate in the land is vested in the widow by the will. The proposition is so plain and obvious, that argument in support of it is not necessary. Attention may be called to the fact, however, that the personal and the real estate are disposed of by separate clauses of the will. In the clause disposing of the personal estate, the language is different from that of the clause devising the real estate. The personal property is to be and remain the absolute property of the wife, if she shall be living at the time of the decease of the testator. Here there is no limitation or restriction upon the estate, except that the wife should be living at the time of the death of the decedent, a limitation which was probably unnecessary and without effect. When the testator comes to the part of his will relating to the real estate, the language of the will is different. Here he says: "All my real estate shall be and remain the absolute property of my beloved wife, as long as she lives." The words "as long as she lives" clearly limit the duration of the estate to the life of the widow. Why did the testator insert separate clauses in his will with reference to his personal and his real estate, if he intended that they should be governed by the same rule of disposition, and the widow to take an estate of the same limit and duration in each? Why, when he comes to dispose of the realty, does he add the words "as long as she lives?"

As to the question whether or not the acts charged amount to waste, there can be no doubt. Indeed, it is not questioned. For a tenant for life to sell and authorize the cutting and

Wolcott *et al.* v. Mack *et al.*

removal of timber trees, under the circumstances here alleged, is to be guilty of waste.

The judgment is reversed, with costs, and the cause remanded for a new trial.

WOLCOTT ET AL. v. MACK ET AL.

CONTINUANCE.—*Absence of Witness.*—*Diligence.*—Where notice of an action was given to a defendant by service of summons on the 13th of March, and he appeared to the action on the 25th of the same month, and made no substantial effort to obtain the testimony of a certain absent witness, until the 21st of October following, five days before the next term of the court in which said action was pending, there could be no error in refusing, at said next term, to grant said defendant a continuance of the cause on account of the absence of said witness.

From the White Circuit Court.

A. W. Reynolds and E. B. Sellers, for appellants.

R. Jones, for appellees.

BIDDLE, J.—This is an action brought by the appellees against appellants, founded on a judgment rendered by the Supreme Court of Niagara County, in the State of New York. Suit was commenced on the 25th day of February, 1874. The summons was issued on the same day, and served on the 13th day of March, 1874, by leaving a copy at the residence of Anson Wolcott. At the March term, on the 25th day of March, 1874, Wolcott appeared to the action. At the same term, answers were filed, issues joined, and the cause continued. At the October term, 1874, Wolcott filed the following affidavit in the case:

“The defendant, Anson Wolcott, being duly sworn, on oath says, that he cannot safely go to trial in the above entitled cause, on account of the absence of George Aylesworth, a material witness for the defendant on the trial of said

Wolcott et al. v. Mack et al.

cause; that he has used due diligence to obtain the testimony of said Aylesworth; that he is not able to state where said witness resides; that he has been informed and believes that he spends part of his time in the State of Michigan; that his business is that of wood-dealer, transporting wood from Michigan to Chicago; that he has written many times to, and made inquiry of, persons who know the said Aylesworth, as to his whereabouts, and has received no other information than as above stated; that he has been frequently informed that he would be found in the city of Chicago; that, on the 21st day of October, 1874, he started from his home in this county, for the city of Chicago, for the purpose of making search for said Aylesworth; but before reaching Chicago, this affiant met with an accident, that so crippled him that he was not able to proceed further, but was compelled to return home; that he is so crippled yet, that he can with great difficulty leave his house and come to this court; that he believes he can procure the testimony of said witness by the next term of this court; that his absence has not been procured by the act or connivance of this affiant, nor by others at his request, or by his request, nor with his knowledge or consent; that he expects to prove by said witness that the judgment sued on by plaintiffs has been fully paid; that he believes said facts to be true; that he is unable to prove said facts by any other witness whose testimony can be as easily procured."

Upon this affidavit Wolcott moved the court for a continuance of the cause. His motion was overruled, and exception taken. This ruling of the court presents the only question insisted upon in the case.

The affidavit is insufficient. To have notice of a suit by service of the summons on the 13th day of March, 1874, appear to the action on the 25th day of the same month, and make no substantial effort to obtain the witness before the 21st of October following, only five days before the commencement of a subsequent term of the court, shows a great

Barnaby *et al.* v. Parker.

lack of due diligence. The affidavit is also unsubstantial in other respects, which need not be noticed.

The judgment is affirmed, with ten per cent. damages, and costs.

BARNABY ET AL. v. PARKER.

PLEADING.—*Reformation of Written Instrument.*—*Mortgage.*—A mortgage of real estate could not be reformed as to the description of the mortgaged premises, and foreclosed as reformed, upon a complaint, which, proceeding as upon the mortgage as executed, afterward merely alleged “said premises” to be a tract, the description of which was given, differing from the description in the mortgage, and asked that the mortgage might be reformed to correspond with the latter description.

53	271
139	629

From the Henry Circuit Court.

C. M. Butler and *Brown & Brown*, for appellants.

C. D. Morgan, for appellee.

BUSKIRK, J.—By this action the appellee sought to obtain a foreclosure of a mortgage against the mortgagors and subsequent purchasers. The complaint was in two paragraphs. The first paragraph proceeded solely upon the mortgage, as it was executed, and then alleged that the mortgagors had subsequently sold and conveyed the mortgaged property to William Barnaby, and that he and his wife had sold and conveyed it to John Bird, who was then the owner of the land.

The second paragraph sets forth the same facts, and then avers “and that afterwards, to wit, on the 1st day of February, 1867, the said John C. Teas and Belle Teas executed to plaintiff and Philip D. Parker their certain mortgage on the following real estate in Henry county, Indiana, and described as follows”—then follows a description of the property, as it is described in the mortgage. The paragraph then proceeds as follows: “That said premises are as fol-

Barnaby et al. v. Parker.

lows:" Immediately following the above is the description of a tract of land, which differs in several respects from the description contained in the mortgage, but there is nothing to show what lands were described or what connection they had with the present action. There is no averment that there was any misdescription of the land in the mortgage, or that the lands last described were the lands that were intended to be mortgaged, and that by mistake or inadvertence the wrong description was given, or that something had been inserted in the mortgage which was not intended to have been inserted, or that something had been omitted which the parties intended to have inserted. The concluding portion of the second paragraph prays that the mortgage may be reformed to correspond with the last description of said premises as described in the said paragraph.

A demurrer, joint as to the pleadings, was filed to the complaint, which was sustained to the first paragraph and overruled as to the second. This was improper, but the conclusion to which we have arrived renders it unimportant. The court decreed a reformation of the mortgage and its foreclosure as reformed, and we are required to decide whether such a decree can be sustained under the averments in the second paragraph of the complaint, and we hold it cannot be upheld. There are no averments in the complaint that justify a reformation. See *Allen v. Anderson*, 44 Ind. 395; *Baldwin v. Kerlin*, 46 Ind. 426, and the numerous cases cited; *Barnes v. Bartlett*, 47 Ind. 98; *Durham v. Bischof*, 47 Ind. 211.

The court, by sustaining the demurrer to the first paragraph of the complaint, held the description of the premises in the mortgage to be insufficient; and by the failure of the appellee to assign a cross error on such ruling, he admits such ruling was right; and by obtaining a reformation of the mortgage under the second paragraph, the appellee concedes that such description is insufficient. We, therefore, decide nothing as to the sufficiency of the description; and there being no cause shown for a reformation of the mortgage, we

The Trustees of The Christian Church of Wolcott v. Johnson.

decide nothing as to the right of the appellee to reform the mortgage as against the subsequent purchasers; but see *Flanders v. O'Brien*, 46 Ind. 284; *Busenbarke v. Ramey*, *post*, p. 499.

We hold that the court erred in overruling the demurrer to the second paragraph of the complaint.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to sustain the demurrer to the second paragraph of the complaint.

THE TRUSTEES OF THE CHRISTIAN CHURCH OF WOLCOTT v. JOHNSON.

CORPORATION.—Contract.—Seal.—A corporation may make a valid contract without using any seal, when not expressly required to contract under the seal of the corporation.

SAME.—Pleading.—Suit against the trustees of a certain church upon a written contract, purporting therein to be the contract of the trustees of said church, and signed "M. T. Didlake, Sec't'y;" the complaint alleging that the contract was signed by the defendants under the name and style of "M. T. Didlake, Sec't'y;" and that the said secretary was duly authorized by the corporation known as "The Trustees of," etc., and by the trustees of said corporation, to enter into said contract.

Held, that it sufficiently appeared that the contract was the contract of said trustees, and that the secretary was authorized to sign it.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellants.

J. H. Wallace and *R. Gregory*, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellants.

The amended complaint is in two paragraphs. The first is on a written contract for the building of a church edifice by the plaintiff for the defendants. It is alleged that the

The Trustees of The Christian Church of Wolcott *v.* Johnson.

plaintiff performed the contract on his part, and that there is due and unpaid upon the compensation agreed upon eight hundred and thirty-two dollars. The object of this paragraph is to recover this amount, and to enforce a mechanic's lien for the same.

The object of the second paragraph is to recover for work and labor and materials, and to enforce a mechanic's lien therefor.

The defendants demurred to the first paragraph of the amended complaint, on the ground that the same did not state facts sufficient to constitute a cause of action, and their demurrer was overruled.

The defendants answered in five paragraphs, the first of which was a general denial. In the second, it was alleged that the plaintiff did not complete the building in the time agreed upon, and damages are claimed in the sum of one thousand dollars. The third alleges that the work was not done in the manner agreed upon, pointing out the deficiencies, and claiming damages in the same amount. The fourth was an answer of payment. The fifth was for work and labor and materials furnished by the defendants to and for the plaintiff, pleaded as a set-off.

Reply in two paragraphs. The first was a general denial. The second was to the second paragraph of the answer, and averred, as an excuse for not having performed the work in the time agreed upon, that the defendants did not pay in part for the work at the time agreed on, and refused to furnish him the plans and specifications provided for in the agreement.

Upon a trial by jury, there was a verdict for the plaintiff for five hundred and twenty-five dollars and twenty cents, and that the same was a lien on the real estate and building.

A motion by the defendants for a new trial was made and overruled, and there was judgment on the verdict.

Two errors are assigned:

1. Overruling the demurrer to the first paragraph of the complaint.

The Trustees of The Christian Church of Wolcott v. Johnson.

2. Refusing to grant a new trial.

1. The first objection to the first paragraph of the complaint is, that the contract sued upon has not the seal of the defendants, as a corporation, affixed to it. There is nothing in this objection. Corporations, when not expressly required to contract under the seal of the corporation, may make valid contracts without using any seal. *Ross v. The City of Madison*, 1 Ind. 281; *McCabe v. The Board of Commissioners of Fountain Co.*, 46 Ind. 380, and authorities cited; and *Vawter v. Franklin College*, ante, p. 88.

Again, it is urged that the first paragraph of the complaint is bad because it does not appear that the contract mentioned in such paragraph was entered into by the trustees. The contract commences as follows:

“WOLCOTT, IND., August 25th, 1873.

“Article of agreement between the trustees of the Christian Church of Wolcott, Ind., of the first part, and Amos Johnson of the second part,” etc.

It is signed “M. T. Didlake, Sec’t’y.” It is alleged that the contract was signed by the plaintiff under the name and style of Amos Johnson, contractor, and by the defendants under the style of M. T. Didlake, Sec’t’y; that said secretary was duly authorized by the corporation known as the Trustees of the Christian Church of Wolcott, White county, Ind., and by the trustees of said corporation, to enter into said contract. We think it sufficiently appears that the contract was the contract of the trustees, and that the secretary was authorized to sign it.

2. Under the second alleged error, it is contended that the damages are excessive, and this was one of the reasons for a new trial stated in the motion. It is not possible for us, governed by the rule which prevails in this court, to disturb the judgment on this ground. The evidence is conflicting. The jury allowed for defective work and materials, and we cannot say that they did not allow enough.

The judgment is affirmed, with costs.

Dutton v. Clapper et al.

58	276
126	458

DUTTON v. CLAPPER ET AL.

PLEADING.—*Fraud*.—Suit on a promissory note, by the payees against the maker. Answer, admitting the execution of the note, and alleging that it was procured by fraud, in this, that the defendant had purchased of the plaintiffs certain machinery, to be delivered on demand, upon receiving which the defendant was to execute his note, due at a certain period thereafter, for a certain sum; that on, etc., before said machinery had been received, and as the defendant was about starting away upon a train, one of the plaintiffs came to him with a note, and falsely and fraudulently assured him that said note was all right and in accordance with the contract; and the defendant, being hurried, and relying upon said representations, signed said note as of that date; but that the plaintiffs fraudulently and wrongfully ante-dated said note as of a certain date, nearly three months prior to the date on which it was signed, the date it was to bear according to the contract; that as soon as he learned that said note had been so ante-dated, he demanded that it should be changed so as to comply with the contract, which the plaintiffs refused to do; and that they withhold said note. Prayer, that it be adjudged fraudulent, etc.

Held, that the answer was bad on demurrer.

From the Morgan Circuit Court.

C. F. McNutt and *G. W. Grubbs*, for appellant.

M. H. Parks and *A. M. Cunning*, for appellees.

BUSKIRK, J.—The appellees sued the appellant upon a promissory note. The appellant answered in four paragraphs. A demurrer was sustained to the first paragraph, and this ruling is assigned for error.

Issue, trial by jury, verdict for appellees, motion for a new trial overruled, and judgment.

The overruling of the motion for a new trial is assigned for error.

The only question discussed by counsel for appellant under this assignment of error relates to an instruction given and one refused. The instruction given and the one refused present the same question as the one which arises upon the action of the court in sustaining the demurrer to the first paragraph of the answer.

The decision of that question will, therefore, dispose of

Dutton v. Clapper *et al.*

all the questions made by counsel for the appellant. That paragraph admits the execution of the note, but alleges, in substance, that it was procured by fraud, in this, to wit: that appellant had heretofore purchased of the appellees certain machinery, to be delivered upon demand; and upon the reception of the same, the appellant was to execute his note, due six months thereafter, for six hundred and fifty dollars; that on July 28th, 1873, and before the machinery had been received, and as he was about starting away on the train, one of the appellees came to him with a note, and falsely and fraudulently assured him that said note was all right and in accordance with the contract; and appellant, being hurried, and relying upon the representations of appellee, signed said note of that date; but that appellees fraudulently and wrongfully ante-dated said note as of March 1st, 1873, instead of July 28th, the date it was to bear according to contract; that as soon as he learned that said note had been so ante-dated, he demanded that it should be changed so as to comply with the contract, which the appellees have refused to do, and they withhold said note. Prayer, that it be adjudged fraudulent, etc.

We think the answer is fatally defective. It shows that the appellant was guilty of such gross negligence as deprives him of the right to complain of false and fraudulent representations on the part of one of the appellees in procuring the execution of the note. There is no pretence that the appellant was unable to read, or that the note was misread to him, or that any trick was resorted to by which he was prevented from reading it for himself. He was asked to sign a note when he was about starting away on the train, and, being hurried, he relied upon the representation of one of the appellees that it was all right and according to contract, and signed the note. According to the averments of the answer, he was under no obligation to execute the note at that time, because the machinery had not been received. He was under neither moral, legal nor physical coercion, and if deceived, he has no one to blame but him-

 Rainey v. The State.

self. According to the law as laid down in the well considered case of *Nebeker v. Cutsinger*, 48 Ind. 436, the answer is clearly bad, and the ruling of the court below was right.

The judgment is affirmed, with five per cent damages and costs.

 RAINEY v. THE STATE.

NEW TRIAL. — *Newly-Discovered Evidence.* — A new trial should not be granted in a criminal action on the ground of the discovery of new and material evidence by the defendant after the trial, where the evidence discovered is not so material that it would, with any certainty, produce or justify any different result from that reached on the former trial.

From the Marion Criminal Circuit Court.

R. P. Parker, J. B. Elam, B. K. Elliott and A. C. Ayres, for appellant.

C. A. Buskirk, Attorney General, and *J. E. Heller,* Prosecuting Attorney, for the State.

DOWNEY, J.—This is an indictment against the appellant for rape committed on the body of Jennie Whelan, on the 10th day of March, 1876, at the county of Marion.

Upon plea of not guilty, the defendant was tried by a jury and found guilty. He moved for a new trial, which was refused, and sentence was pronounced against him.

He has assigned as errors the overruling his motion to quash the indictment, and the refusal to grant him a new trial; but he argues and relies upon the latter only.

It is first urged that there is no positive evidence of the *corpus delicti*, and that this cannot be established by circumstantial evidence.

Counsel refer to and rely mostly on *Ruloff v. The People*, 18 N. Y. 179, in support of this position. This case was cited in *McCulloch v. The State*, 48 Ind. 109, and was not

53	278
143	688
53	278
165	160

53	278
170	654

Alford et al. v. Baker et al.

admitted as authority to the extent claimed for it in that case. Conceding, however, that it is authority in a case presenting the same facts, we think this is not such a case. There is some positive evidence in this case of the fact that a rape was committed by some person upon the prosecutrix. We do not care to give the evidence in detail. We have read it in consultation, and are of the opinion that, upon this point, as well as upon the whole case, it is such that we cannot disturb the judgment.

A ground of the motion for a new trial was the discovery of new and material evidence by the defendant after the trial. We have, with some hesitation, come to the conclusion that this evidence is not so material that it would, with any certainty, produce or justify any different result from that reached by the jury on the former trial. In such case a new trial should not be granted. *Bronson v. Hickman*, 10 Ind. 3; *Hull v. Kirkpatrick*, 4 Ind. 637. It is possible that in this case, as in many or most others, the defendant may be innocent; but the evidence is such as to render the conviction reasonably satisfactory.

The judgment is affirmed, with costs.

ALFORD ET AL. v. BAKER ET AL.

PLEADING. — *Fraudulent Conveyance.* — *Debtor's Insolvency.* — In an action whereby a creditor seeks to recover judgment for the amount of his claim and to subject to execution property fraudulently conveyed by his creditor to a third person, an allegation in the complaint that the debtor has no property left subject to execution is a sufficient allegation of the debtor's insolvency, and shows a sufficient reason for seeking to reach the property so fraudulently conveyed.

SAME. — *Description of Property.* — *Defect Cured by Verdict.* — In such a complaint, the property alleged to have been fraudulently conveyed was described as "a tobacco factory in the city of Logansport, situate at the

53	279
153	510
53	279
150	41

Alford *et al.* v. Baker *et al.*

lock foundry, worth, with the fixtures and appurtenances, seven thousand dollars."

Held, on motion in arrest of judgment, that this was sufficient to let in proof which might render the identity of the property certain, and the description was therefore good after verdict for the plaintiff.

FRAUDULENT CONVEYANCE.—*Insolvency.*—*Property in Another State.*—Where a debtor, residing in this State, has fraudulently conveyed away all his property subject to execution in this State, the fact that another person indebted with him as his partner, residing in another state, and having no property in this State, owns property in said other state, out of which the creditor could make his demand, will not prevent the creditor from proceeding to reach the property so fraudulently conveyed, though he may reside in said other state and the debt may have been contracted there.

PAYMENT.—*Promissory Note.*—The giving of a promissory note governed by the law merchant for a pre-existing indebtedness of the maker to the payee will discharge the debt, unless it be shown that the parties did not intend it to have that effect; but the giving of a promissory note not governed by the law merchant for such a debt does not operate as a payment thereof, unless it be so expressly stipulated between the parties.

SAME.—Where one seeks to avoid the payment of a debt on the ground that he has given his promissory note for it, which has matured, and which he has not paid, he must show affirmatively that by stipulation the note was to be received as payment, or that it was of such a character as to carry with it the legal inference that it was thus received.

PROMISSORY NOTE.—*Payable in Another State.*—*Presumption as to Law of Another State.*—The courts of this State will presume, in the absence of proof to the contrary, that a promissory note made payable in another state is governed by the common law, and not by the law merchant.

From the Carroll Circuit Court.

S. T. McConnell, J. H. Gould, and Turpie & Pierce, for appellants.

D. P. Baldwin and M. Winfield, for appellees.

WORDEN, C. J.—This action, which was commenced in the county of Cass, and taken by change of venue to Carroll, was brought by the appellees, Stanley A. Baker and Americus L. Symms, against Corrington L. Alford and Lewis L. Ross, as partners under the name of Alford & Ross, and Loyal A. Alford. The complaint sought to recover from the defendants Corrington L. Alford and Lewis L. Ross the sum of twelve thousand dollars for goods sold and delivered

Alford et al. v. Baker et al.

by the plaintiffs as partners, to the defendants Corrington L. Alford and Ross, and for money paid, laid out and expended by the plaintiff for the use of those defendants; and also to subject certain property to execution, which had been, as was alleged, fraudulently conveyed to said Loyal A. Alford.

The complaint was in several paragraphs, but for the purposes of the questions involved, we need notice but one. The first paragraph, which has been sent up in return to a writ of *certiorari*, it having been omitted in the original transcript, after stating the indebtedness, proceeds as follows, viz.:

“That the firm of Alford & Ross, at the date of said sale, owned a tobacco factory in the city of Logansport, situate at the lock foundry, worth, with the fixtures and appurtenances, seven thousand dollars. The defendant Ross was a non-resident, and this was all his property in Indiana. That defendant Corrington L. Alford owned the east half of outlot number seven (7), Tipton’s administrator’s addition to Logansport, which lot was greatly improved, and worth, with improvements, five thousand dollars; thus said firm was solvent; that Loyal A. Alford is the father of said Corrington; that to fraudulently cheat, hinder and defraud these plaintiffs in the collection of their said debt, the said Corrington L. Alford fraudulently conveyed to the defendant Loyal A. Alford, and, without consideration paid him therefor, transferred, and the said Loyal A. Alford, fraudulently, and to cheat and delay these plaintiffs in the collection of said debt, received from his son, C. L. Alford, conveyances of said house and lot, and of his, said C. L. Alford’s, interest in said tobacco factory; that to further effect said fraudulent schemes, the said C. L. Alford, then owning a lot or lots and buildings in Chicago, fraudulently conveyed the same to said Ross, and Ross conveyed the other half of the tobacco factory to said L. A. Alford, father of said C. L. Alford. The plaintiff charges that said L. A. Alford obtained this conveyance to further effect said fraud and absorb all of said C. L. Alford’s property in his own name. That, by

Alford et al. v. Baker et al.

these conveyances, Alford & Ross have no property left subject to execution, the same being wholly held and owned by said L. A. Alford; that the purpose of said conveyances by the Alfords was and is to defraud these plaintiffs."

No demurrer was filed to either paragraph of the complaint, but an answer of several paragraphs was filed, and issue joined. The cause was submitted for trial to a jury, who returned a general verdict for the plaintiffs, with answers to interrogatories. The jury, in answer to interrogatories, found that Corrington L. Alford conveyed his interest in the tobacco factory and the other property to his father, with the fraudulent intent to cheat, hinder and delay the creditors of the firm of Alford & Ross, and that his father, Loyal A. Alford, had knowledge at the time, of the fraudulent intent. By the general verdict, the jury found in favor of the plaintiffs against Corrington L. Alford and the defendant Ross, in the sum of ten thousand one hundred and fourteen dollars and eighty-two cents, and against all the defendants, that the property was conveyed to cheat, hinder and delay creditors, and that the conveyances ought to be set aside, and the property subjected to the payment of the plaintiffs' claim.

Motions for a new trial and in arrest of judgment overruled, and exception.

The two Alfords appeal, Ross not joining therein.

We proceed to consider the questions relied upon in the brief of counsel for the appellants for a reversal.

It is claimed that neither paragraph of the complaint states facts sufficient to constitute a cause of action against Loyal A. Alford, and, therefore, that his motion in arrest of judgment should have prevailed. It may be observed that the appellants' printed brief was filed before the transcript was amended by the return of the first paragraph of the complaint. The main objection to the complaint is, that neither paragraph alleges the insolvency of Corrington L. Alford and Ross, and, therefore, shows no necessity for a

.

Alford *et al.* v. Baker *et al.*

resort to the property alleged to have been fraudulently conveyed, in order to make the plaintiffs' debt.

The first paragraph, it will be seen, alleges, that, by the conveyances, "Alford & Ross have no property left subject to execution." This is a sufficient allegation of insolvency, and shows a sufficient reason for seeking to reach the property in question.

Again, it is urged that the property is not sufficiently described. The half of the outlot seems to be sufficiently described to identify it. The description of the tobacco factory, with the fixtures and appurtenances, which seems to have been personal property, is rather indefinite, but, as we think, good enough after verdict. The description is "a tobacco factory in the city of Logansport, situate at the lock foundry, worth, with the fixtures and appurtenances, seven thousand dollars."

This is sufficient to let in proof which might render the identity of the property more certain. "After verdict the court will support the declaration by every legal intendment, if there is nothing material on record to prevent it. Where a fact must necessarily have been proved at a trial to justify the verdict, and the declaration omits to state it, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof." *Shimer v. Bronnenburg*, 18 Ind. 363.

"The expression, *cured by verdict*', says Mr. Chitty, 'signifies that the court will, after a verdict, presume, or intend, that the particular thing which appears to be defectively or imperfectly stated, or omitted, in the pleading, was duly proved at the trial.'" *Peck v. Martin*, 17 Ind. 115. "Lord MANSFIELD, in the case of *Rushton v. Aspinall*, stated the rule to the following effect: 'Where the *statement* of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor; because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial, and it is, there-

Alford et al. v. Baker et al.

fore, a fair presumption that they were proved.'” *Westfall v. Stark*, 24 Ind. 377. See, also, *Taylor v. Short*, 40 Ind. 506.

We have not examined with much care the other paragraphs of the complaint. The first is, in our opinion, sufficient in all respects to uphold the judgment on the verdict, both as against Loyal A. Alford and the other defendants, and, therefore, the motion in arrest was properly overruled.

The court gave to the jury the following instructions, which are claimed to have been erroneous, viz.:

“No. 3. A creditor having a resident debtor in Indiana, is not bound to go out of this State to collect his claim. If a debtor fraudulently conveys away all his property subject to execution within Indiana, it is no excuse for the fraud that the debtor’s partner has property in Ohio, out of which the creditor could make his demand.”

“No. 16. If you find from the evidence that C. L. Alford, at the time this suit was instituted, had no property in the State subject to execution, and that Ross was a non-resident of Indiana, and had, before the institution of this suit, sold all his property within this State, this is sufficient proof of insolvency.”

“No. 19. If you find from the evidence that the plaintiffs had a running account with the firm of Alford & Ross, extending over the space of one or two years; that during this time the said firm gave to the plaintiffs their negotiable promissory note for a less amount than was due the plaintiffs, which was only to be considered as a payment on the account in case said note was paid; that the plaintiffs negotiated said note, but that the same was not paid by the defendants when due; and that the note was paid at a bank in Covington, where negotiated, by the plaintiffs, and which was then and there cancelled by the bank and surrendered to the plaintiffs; that in all the subsequent negotiations between the plaintiffs and defendants, said note was not treated as a payment on an account, and that the defendants actually gave the plaintiffs credit on their books for the note so paid,

Alford *et al.* v. Baker *et al.*

such note would not be a payment, even though the plaintiffs gave the defendants credit on their books for said note. *The giving of a promissory note by the debtor to his creditor for a pre-existing debt is not a payment, unless at the time it is expressly agreed that it shall be received in payment of the debt.*"

We think there was no error committed in giving the third and sixteenth instructions. The plaintiffs were not required to go into another state to find property out of which to make their claim, before they had a right to attack the fraudulent sales and subject the property to the payment thereof. But it is claimed by the appellants, that, as the plaintiffs resided in Ohio, where the goods were sold for which the action was brought, and as one of the defendants, Ross, resided in Ohio, the property of Ross in Ohio should have been subjected to the payment of the debt before proceeding to reach the property in question. We do not concur in this view. If one of the defendants resided in Ohio, and one in Indiana, the plaintiffs had a right to pursue their remedy in either state, and to subject property within the jurisdiction, and in accordance with the laws of that state, to the payment of their debt. And, for this purpose, it is immaterial whether the debt was contracted in the state where the action is brought; or elsewhere.

It is only the latter part of the nineteenth charge, as we understand the brief of counsel for the appellants, to which objection is made. We have italicised the portion objected to for distinctness.

The charge, taken altogether, seems to us to have been correct; and the portion objected to, standing by itself, is not incorrect. The giving of a negotiable promissory note, governed by the law merchant, for a precedent debt, will be held to be a discharge of the debt, unless it be shown that the parties did not intend it should have that effect. The reason is, that the maker might be put to inconvenience, and perhaps obliged to pay the debt twice, as he cannot set up a payment of his original debt, after a seasonable endorsement of

Alford *et al.* v. Baker *et al.*

the note, against the claim of an innocent holder. *Maxwell v. Day*, 45 Ind. 509. But we have a class of notes that are negotiable, and yet not governed by the law merchant. Such are notes payable generally, and not out of the state, and not in a bank in this State. "Whatever defense or set-off the maker of any such instrument had, before notice of assignment, against an assignor, or against the original payee, he shall have also against their assignees." 1 G. & H. 448, sec. 3.

Thus it is seen that the reason of the rule does not apply, unless the note is governed by the law merchant. The maker of a note not governed by the law merchant may avail himself of any defense that may accrue to him before he has notice of assignment; and we think it clear that the taking of such note for a precedent debt does not operate as payment of the debt, unless it is so expressly stipulated between the parties. *Tyner v. Stoops*, 11 Ind. 22; *Huff v. Cole*, 45 Ind. 300.

The part of the charge objected to does not speak of a note governed by the law merchant, nor even of a negotiable note. It is correct, as applied to a promissory note which is not governed by the law merchant.

It is the duty of him who seeks to avoid the payment of a debt, on the ground that he has given his promissory note for it, which has matured, and which he has not paid, to show affirmatively that, by stipulation, it was to be received as payment, or that the note was of such character as to carry with it the legal inference that it was thus received.

The note in this case, to which the instruction applied, was both made in Kentucky and payable at a bank in Kentucky. It was therefore governed by the law of Kentucky. *Hunt v. Standart*, 15 Ind. 33. We cannot apply to it the law of Indiana, to determine whether or not it was governed by the law merchant. At common law, promissory notes were not placed upon the footing of bills of exchange, or governed by the law merchant. It was the statute of third and fourth Anne that effected this. *Holloway v. Porter*, 46

Alford *et al.* v. Baker *et al.*

Ind. 62. We must presume, in the absence of proof to the contrary, that the common law prevails in Kentucky, and, therefore, that the note in question is governed by the common law. *Johnson v. Chambers*, 12 Ind. 102; *Crake v. Crake*, 18 Ind. 156; *Buckinghouse v. Gregg*, 19 Ind. 401; *Smith v. The Muncie National Bank*, 29 Ind. 158. We cannot presume that the statute of Anne or any similar statute is in force in that state. Where the law of another state, claimed to be different from the common law, is involved in a judicial proceeding in this State, it becomes matter of fact in such proceeding, and must be proved, and, indeed, alleged, unless the question arises in such a way as to render the pleading unnecessary. If, by any statute of Kentucky, or by the general course of the decisions of the courts of that state, such note is placed upon the footing of bills of exchange and governed by the law merchant, that fact might have been, but was not shown. Our statute makes provision for the proof both of the written and unwritten law of another state. 2 G. & H. 184, sec. 285; p. 187, sec. 290.

The note, on the evidence before the jury, did not appear to have been governed by the law merchant, and the instruction in reference to it was correct.

We cannot disturb the verdict on the evidence, which, in our opinion, is sufficient to justify the conclusions arrived at by the jury.

We have thus passed upon the points relied upon for a reversal, and find no error in the record.

The judgment is affirmed, with costs.

Kestner v. Spath et al.

KESTNER v. SPATH ET AL.

PROMISSORY NOTE.—*Suit on Indorsement.—Insolvency of Maker.*—Where the maker of a promissory note, which was indorsed after its maturity by the payee to a third person, was insolvent at the time of such indorsement, and so continued, it was not necessary for the indorsee to sue the maker before suing upon the indorsement, though the maker was solvent at the maturity of the note.

From the Dearborn Circuit Court.

J. Schwartz, for appellant.

H. D. McMullen, for appellees.

BUSKIRK, J.—This was an action by the appellees against the appellant upon the indorsement of a promissory note executed by the firm of S. Siemantel & Co. to the appellant and by him indorsed to the appellees. It is alleged in the complaint, that when said note became due, the said S. Siemantel & Co. were and still are wholly insolvent, having no property subject to execution, so that an action against them would have been unavailing.

There was issue, trial by jury, verdict and judgment for appellees.

The only error assigned is based upon the overruling of the motion for a new trial.

It is earnestly contended by counsel for appellant, that the verdict is not sustained by the evidence, or, in other words, it is insisted that it fully appears from the evidence that, when the note became due, the makers were solvent. This is true, but is not decisive of the case. The note was executed on the 25th of July, 1868, and was due one day after date. The indorsement was blank. In the absence of proof, the presumption would be that the indorsement was made at the date of the note.

It appears from the evidence, that the appellant was the guardian of the appellees, and that the note in question was given for money which belonged to them, and that, after the execution of the note, it was delivered to one of the appellees, who collected interest thereon. It further appears that

The Toledo, Wabash and Western Railway Co. v. McDonough.

the note was returned to the appellant, who indorsed it, in May or June, 1870, and that at such time the makers were insolvent and so continued down to the time of the trial. The present action is based upon such indorsement. It clearly and unmistakably appears that an action would have been unavailing after the indorsement. Had the appellant chosen to stand upon an equitable transfer, quite a different question would have been presented; but he made an indorsement without limiting his liability, and as the makers of the note were insolvent when the indorsement was made, the appellees were not required to sue, and are entitled to recover upon his indorsement. *Roberts v. Masters*, 40 Ind. 461.

The judgment is affirmed, with five per cent. damages and costs.

**THE TOLEDO, WABASH AND WESTERN RAILWAY CO.
v. McDONOUGH.**

RAILROAD.—Ejection of Passenger from Train.—A person who had purchased of a railroad company, at one of its stations, a first class ticket for passage from said station to another on the railroad of said company, started upon a mixed train, composed of freight and passenger cars, the conductor of which, upon taking up said ticket, gave the passenger a card, on which said conductor had written the number of the station to which said passenger was to be carried, and the initial letters of said conductor's name. At an intermediate station, said passenger left said mixed train and got upon an express train, which there passed said mixed train, and which would arrive at his destination sooner than said mixed train, he having been assured by the conductor of the mixed train that said card would be received by the conductor of the express train, and would be as good as his ticket, and a brakeman on the mixed train, upon reaching said intermediate station, having announced the approach of said express train, and having told the people in the car in which said passenger was, on said mixed train, to get out and go to the station, to be

53	289
161	159
161	185

The Toledo, Wabash and Western Railway Co. v. McDonough.

ready to take the express train. The conductor of the express train refused to accept said card, and upon the refusal of said passenger to pay again, caused him to be forcibly put off the train, at night, and not at a station or house; and when said mixed train came along, said passenger was taken upon it and carried to his destination.

Held, that said passenger was entitled to damages for his said ejection, though said card was merely the private mark of the conductor who gave it, used only by himself, on his own train, for his own convenience; and said passenger, when he purchased his ticket, made no inquiry as to the rules of the company in relation to carrying passengers, and transferred himself from the mixed to the express train without having a stop-off check, such as the company sanctioned; and the conductor of the mixed train had such stop-off checks at the time he gave said card; and the passenger did not call on said conductor for such a check, and refused to pay his fare on the express train or leave said train unless put off by force; and he was taken upon the mixed train in about five minutes after he was so put off, and carried safely to his destination; and the company was not in the habit of carrying passengers from the mixed train, upon the express train, on the private checks of the conductor of the former train, but on the regularly authorized stop-off checks of the company, which represented nothing more than the original ticket represented.

Held, also, that damages in the sum of four hundred dollars were not excessive.

From the Allen Circuit Court.

J. R. Coffroth, C. B. Stuart and T. A. Stuart, for appellant.

DOWNEY, J.—This was an action by the appellee against the appellant to recover damages for being put off the cars on the road of said company, wrongfully, as is alleged. The defendant answered in three paragraphs. The first was a general denial, and the second and third were special paragraphs. The plaintiff demurred to the second and third paragraphs, and the demurrers were sustained. Upon a trial by jury, there was a general verdict for the plaintiff, and also answers to interrogatories propounded at the instance of the defendant.

The defendant moved the court for judgment in its favor, on the answers of the jury to the interrogatories, notwithstanding the general verdict, but the motion was overruled. It then moved the court for a new trial, and this motion

The Toledo, Wabash and Western Railway Co v. McDonough.

also was overruled, and there was final judgment for the plaintiff.

There are sixteen specifications in the assignment of errors, but only three of them are proper assignments. We affix to them our own numbers:

1. Sustaining the demurrers to the second and third paragraphs of the answer.

2. Refusing to render judgment on the special findings of the jury.

3. Overruling the motion for a new trial.

1. The second and third paragraphs of the answer were partial defences to the action, and were not necessary, after pleading the general denial. The defendant was not injured by this action of the court. The whole merits of the case appear to have been examined under the issue formed by the general denial of the allegations of the complaint.

2. The plaintiff purchased a first class ticket at Toledo for Fort Wayne. He started on what is denominated a mixed train; that is, a train composed of freight cars and one or more passenger cars. The train was behind time in starting. The conductor took up the plaintiff's ticket, and gave him a card, or piece of pasteboard, as it is called in the evidence, on which was written by the conductor the figures 12, and under them the letters E. C.; the figures representing the number of the station to which the plaintiff was going, Fort Wayne, and the letters the initials of the conductor's name.

An express passenger train followed the train on which the plaintiff was passenger, and, as he desired to reach Fort Wayne sooner than he could do on the mixed train, he determined to get on the express train, when it overtook the train he was on, which it did at New Haven, the next station east of Fort Wayne. The plaintiff and other witnesses in his behalf testified, that the conductor assured him that the card, or piece of pasteboard, which he gave him, would be received by the conductor of the express train and be as good as his ticket. This the conductor denied in his testi-

The Toledo, Wabash and Western Railway Co. v. McDonough.

mony. It was testified that when the train came near to New Haven, a brakeman came into the car in which the plaintiff was seated, and announced that the passengers should go into the caboose, or smoking car, that they were going to cut off and leave the coach they were then in; that the passengers went into the caboose; that when they reached New Haven, the same brakeman came in and told the passengers the express was coming, and for them to get out and go to the station, ready to take that train; that the brakeman seemed excited, and said, "Hurry up, don't be all night about it!" When the express train came along, the plaintiff and several other passengers from the mixed train got on it. When the conductor of the express train came to the plaintiff for his fare or ticket, he refused to accept or recognize his card, or piece of pasteboard, and, upon plaintiff's refusal to pay again, called a brakeman and had the plaintiff ejected from the car, in the night, and not at any station or house. When the mixed train came along it was hailed and stopped and took the plaintiff on board, and carried him to Fort Wayne.

Without setting out in full the interrogatories and answers thereto, we may state the substance of the answers. It was found that the card, or piece of pasteboard, was not anything more than the conductor's private mark, used only by himself, on his own train, for his own convenience; that the plaintiff, when he purchased his ticket at Toledo, made no inquiry what the rules of the company were, in relation to the carrying of passengers; that the plaintiff transferred himself from the accommodation to the express train, without having a stop-off ticket, such as the company had sanctioned; that the conductor of the accommodation train had regularly authorized stop-off checks, at the time he gave the plaintiff the pasteboard; that the plaintiff did not call on the conductor for a stop-off check; that he refused to pay his fare on the express train, or to leave the same, unless he was put off by force; that after he was put off, the accommodation train picked him up in about five minutes afterwards and carried

The Toledo, Wabash and Western Railway Co. v. McDonough.

him safely to Fort Wayne; that the company was not in the habit of carrying passengers from the accommodation train on the express train, on the private checks, or pasteboards, of Clark, the conductor, but on the regularly authorized stop-off checks of the company; that there is no station on the road between New Haven and Fort Wayne; that there were no houses discovered near where the plaintiff was put off; and that the stop-off ticket represented nothing more than the original ticket represented.

We think these special findings are not so inconsistent with the general verdict as to justify the rendition of judgment upon them, instead of upon the general verdict. The jury may have found that the conductor of the accommodation train assured the plaintiff, as he and others testified, that the card, or piece of pasteboard, would secure him transportation on the express train. If he did so assure him, we do not see why the company is not liable for the act of the other conductor, in putting him off the express train. It may be remarked that a stop-over ticket would hardly have been applicable to the case, as the plaintiff not only did not wish to stop over, but wished to be carried on with greater speed.

3. Under this assignment of error, it is urged that the court improperly refused to suppress certain depositions and parts of depositions. The record does not show this action of the court by proper bill of exceptions, so that we can decide the question. There may have been a bill of exceptions signed by the judge, but if so, we can not tell what part of the record it embraces.

It is also claimed that the damages are excessive. The amount of the verdict is four hundred dollars. We cannot say that the amount is excessive.

No question arises upon instructions given or refused. The instructions, although copied, are not legally a part of the record. Those given by the court on its own motion are not signed by the judge, and those proposed by counsel

Love et al. v. Miller et al.

are not signed by counsel. None of them are in any bill of exceptions.

The judgment cannot be reversed on the evidence.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

53 294
125 592

LOVE ET AL. v. MILLER ET AL.

PRINCIPAL AND AGENT.—*Real Estate Broker.*—Where an owner of certain real estate agreed with a broker, that if the latter would “find a purchaser, or make a sale of said real estate,” said owner would pay said broker, for his commission, a certain sum; and, in pursuance of said agreement, the broker effected a bargain and sale of said real estate, by a contract which was mutually obligatory on said owner as vendor and a third person as vendee, the broker was entitled to said commission, though the vendee afterwards refused to execute his part of said contract of sale.

From the Marion Superior Court.

J. T. Dye and *A. C. Harris*, for appellants.

C. W. Smith and *R. O. Hawkins*, for appellees.

BIDDLE, J.—The appellants were real estate brokers in the city of Indianapolis. The appellees were owners of certain real estate, situated in the city, on the corner of Washington and Mississippi streets. The parties mutually agreed that if the appellants would “find a purchaser, or make a sale of said real estate,” they should receive for their commission one thousand dollars, which the appellees agreed to pay. In pursuance of this agreement, the appellants procured an offer for the real estate mentioned, from John Wymond, which was accepted by the appellees. The offer and acceptance are in the following words:

“To Messrs. Miller and Crawford,

“GENTS:—I will give you for your property on the cor-

Love et al. v. Miller et al.

ner of Washington and Mississippi streets, in the city of Indianapolis, Ind.: I will assume forty-five thousand dollars now on the property, after deducting the back interest, and give you my dwelling property, in which I now reside, at Lawrenceburgh, Ind., and pay you five thousand dollars in cash; and I am to have the rents from December 1st, 1873.

JOHN WYMOND.

"Indianapolis, Dec. 4th, 1873.

"We accept the above proposition.

"SCOTT MILLER.

"J. MONROE CRAWFORD."

On the 8th of December, 1873, the parties met at the office of the appellants, to carry out the agreement by executing the proper conveyances interchangeably and paying and receiving the purchase-money. After some talk between and amongst the parties, Wymond became dissatisfied with the agreement as a bargain, and refused to execute his part of it; whereupon, the appellants informed the appellees that they, the appellees, could hold Wymond to his agreement, and that they, the appellants, should hold them, the appellees, for their commission of one thousand dollars. These are the essential, and, we believe, the undisputed facts of the case. The appellees refused to pay the commission, and the appellants brought this suit. We do not state the issues nor the proceedings, as no question is made concerning them. The finding and judgment below were against the appellants. The main question there was, and here is, are the appellants entitled to recover their commission against the appellees, upon the facts stated? And the case, we think, turns upon the sole question whether the offer and acceptance, as set forth, amounts to "finding a purchaser, or making a sale" of the real estate described or not, within the meaning of the agreement made between the appellants and appellees.

The question involved in this case has never before been presented in this State, we believe. Indeed, we have very few reported cases, in any way touching the subject-matter

Love *et al.* v. Miller *et al.*

of brokers' commissions. The authorities of other states do not seem to entirely agree; but upon close analysis, it does not appear that they are in serious conflict.

To complete a sale of personal property, either actual or potential delivery of the article sold is necessary, unless there is some different special stipulation in the agreement. In ancient times, it was necessary, in the sale of land or a tenement, to complete the right of possession by the delivery of a turf or clod, which ceremony was called *livery of seisin*; but, in the advancement of civilization and intelligence, when written deeds were introduced, this cumbrous and symbolical performance fell into disuse, and has long since been abolished. A bargain and sale, since the enactment of the statute of uses and trusts, "is a kind of a real contract, whereby the bargainer, for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee, and becomes by such a bargain trustee for, or seized to the use of, the bargainee; and then the statute of uses completes the purchase; or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession." '2 Bl. Com. 338. Indeed, conveyance in trust is frequently nothing more than a contract that the trustee shall convey the land in some special manner, or to some particular person, or as the *cestuy que use* may direct. According to this view, a contract to convey may be held as a sale. No question has been made in this case as to the validity of the contract between the vendors and vendee.

The following cases are cited on behalf of the appellees:

McGavock v. Woodlief, 20 How. U. S. 221. In that case, the vendor gave his broker specific directions to sell his plantation and slaves for one hundred and thirty thousand dollars, of which twenty thousand dollars was to be paid in cash, and the remainder in five equal, annual instalments, with interest. The broker found a purchaser, George M. Long, who agreed to these terms, but when they proceeded to execute the contract, Long and the broker changed the

Love *et al.* v. Miller *et al.*

terms of it, by substituting Long's wife as the purchaser, and were to negotiate certain notes she held against Dr. Bard, to apply on the one hundred and thirty thousand dollars, and made no special arrangement at all as to the payment of the twenty thousand dollars. To this new agreement, as far as the evidence showed, the vendor never consented. The case, in short, is this: The vendor directs his broker to sell his property according to specific terms; the broker ultimately changes the terms to another contract, to which the vendor never agreed. Upon this ground, it was held, that the broker could not recover for his commission, and we think very properly. But it is quite a different case from the one before us. True, Mr. Justice NELSON, in delivering the opinion of the court, says: "Certainty in the offer to fulfil is as important to the vendor as in the terms of the sale to the vendee, and equally necessary before the vendor can be put in fault. The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions."

These words, however, must be held to have been spoken, not generally, but in reference to a purchase according to the terms specifically given to the broker by the vendor.

Richards v. Jackson, 31 Md. 250. This case supports the appellees, in principle. There was a clause of forfeiture, however, in the contract, by which the purchaser could abandon it on payment of two hundred and fifty dollars. But the decision of the case was not put upon this ground.

Read v. Rann, 10 B. & C. 438. This case bears upon the point in question, but is not analogous to the case we are considering. The suit was brought upon a *quantum meruit* count, and the proof showed a special contract, unfulfilled; and upon this ground, the broker failed to recover, PARKE, J., remarking:

"The claim of the plaintiff rests on the custom, and not on a *quantum meruit*. The custom supposes a special con-

Love *et al.* v. Miller *et al.*

tract between the parties, and if that is not satisfied, no claim at all arises, for no other contract can be implied.”

Kimberly v. Henderson, 29 Md. 512. In this case, the brokers brought the vendor and the vendee together, and they executed certain papers, “whereby they respectively contracted for the sale and purchase of the property, with a stipulation that in case either party should fail to comply with the contract, a forfeiture of one thousand dollars should be paid by the party in default, to the other.” The vendee failed to comply with the contract, and paid the forfeiture. This contract could not be mutually enforced between the vendor and the vendee; and upon this ground it was held that the brokers could not recover for their commission. ALVEY, J., in delivering the opinion of the court, remarked:

“Here the undertaking failed. A party was produced, it is true, and a contract entered into through the agency of the appellees, but of such a character that the party contracting, by the exercise of an option given him, relieved himself of the obligation to complete the purchase, and did not, in fact, become the purchaser.”

Besides, the brokers inserted a clause in the contract which was not communicated to their principal. True, in this case there is a *dictum* spoken by the judge, which would seem to support the view taken by the appellees, but that, we must suppose, was spoken of the contract before him, and not as a general principle, applicable to all contracts for a broker's commission; at least, being a mere *dictum*, it is not authoritative.

De Santos v. Taney, 13 La. An. 151. De Santos, a real estate broker, was employed by Taney to sell three houses. Avegno made an offer, through De Santos, to Taney, to buy the houses for fifteen thousand five hundred dollars, which Taney accepted in writing. When the parties met, to have the papers signed by Avegno, he and Taney disputed about the payment of the taxes on the property, Avegno insisting that, by the agreement with the broker, he was to pay but two-twelfths of the taxes, while Taney

Love *et al.* v. Miller *et al.*;

insisted that his intention was to have the sum named for his property, without any deduction for taxes; upon this the parties disagreed, and the contract was not consummated. And the decision of the case was made to turn upon the point that the contract failed "on account of the broker's neglect to stipulate clearly concerning the taxes." This case, in its premises and conclusion, does not support the appellees; though BUCHANAN, J., said:

"But all the authorities confirm the doctrine of Judge MARTIN, as we understand it, that no brokerage is due until the sale is complete and executed, that is to say, until the consideration of the sale has passed to the vendor."

We are not convinced that all the authorities confirm this proposition; indeed, we have been unable to find one that carries the doctrine to such an extent.

SPOFFORD, J., in the same case, expresses an opposite opinion. He says:

"I do not think it necessary that the consideration should have passed, but I consider brokerage earned so soon as the broker has effected a complete bargain between the parties."

Here are two *dicta* from different judges, in the same case, quite opposite, while both agree as to the principle upon which the case is decided. This is a strong instance to warn us from following what a judge says, instead of what a court decides. The *dictum* of a judge is very different from the decision of a court, although the judge and the court may be the same person, and the *dictum* and decision in the same case. There is nothing authoritative in a case, except what is required to be decided to reach the final judgment, and what by the judgment becomes *res adjudicata* between the parties as to the subject-matter of the suit.

We have thus carefully examined all the authorities cited by the appellees, and considered the argument in support of their views, but we are unable to adopt the extreme rule contended for by them—approved but by the single case of *Richards v. Jackson*, *supra*, and expressed *obiter* by only one of the judges in the case of *De Santos v. Taney*, *supra*—namely,

Love et al. v. Miller et al.

“that no brokerage is due until the sale is complete and executed; that is to say, until the consideration of the sale has passed to the vendor.” This rule is not supported, indeed we think it is quite overthrown, by the current of authorities; nor does it seem to us to be applicable to the State of Indiana. In this State, lands are bought and sold almost as freely as commodities; they are often mortgaged or pledged as a basis of business operations; sales are made upon deferred payments, for the purpose of holding them as investments; conveyances are frequently executed in trust, for the convenience of the parties; large quantities of lands are held by executive contracts, to facilitate transfers by assignments; in many of which cases the consideration is not paid, and not to be paid, and the titles conveyed in fee, for months and even years, after the sale is made, possession given and full enjoyment had. Under such circumstances, to adopt a rule which would deny the broker his commission until the consideration was paid and the final conveyance executed, would be manifestly unsuitable to our condition, and we think unjust. We are of opinion that when the broker has effected a bargain and sale, by a contract which is mutually obligatory on the vendor and vendee, he is entitled to his commission, whether his employer chooses to comply with or enforce the contract or not. The following authorities support us in our conclusion: *Cook v. Fiske*, 12 Gray, 491; *Drury v. Newman*, 99 Mass. 256; *Middleton v. Findla*, 25 Cal. 76; *Knapp v. Wallace*, 41 N. Y. 477; *Stillman v. Mitchell*, 2 Rob. N. Y. 523; *Higgins v. Moore*, 34 N. Y. 417; *Heinrich v. Korn*, 4 Daly, 74; *Rice v. Mayo*, 107 Mass. 550; *Mooney v. Elder*, 56 N. Y. 238; *Barnard v. Monnot*, 40 N. Y. (3 Keyes), 203; *Chapin v. Bridges*, 116 Mass. 105.

The case of *Lane v. Albright*, 49 Ind. 275, is in harmony with the above authorities in principle, though not in point as to fact with the case we are considering. In that case, the agent was negotiating a sale, but was prevented from completing it, by the act of the vendor in making the sale

Chamness v. Chamness.

himself; in this case, the brokers had completed the sale, but the vendors refused to enforce the contract. We can see no distinction between the cases in principle, as to the rights of the agent or the brokers. In the one case, as the failure to complete the contract was not the fault of the agent, we held that he was entitled to his compensation; in this case, as the failure to enforce the contract after its completion was not the fault of the brokers, we must hold that they are entitled to their commission.

The judgment is reversed; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

CHAMNESS v. CHAMNESS.

53	301
169	392

PLEADING.—*Bill of Particulars.*—*Waiver.*—*Evidence.*—When an answer is not accompanied by a bill of particulars, the plaintiff, by failing to demur or to move for a bill of particulars, waives objection to the fact that no bill of particulars accompanies the answer; and on the trial, such fact cannot constitute a reason for sustaining an objection to a question propounded to a witness by the defendant.

RECORD.—*Bill of Exceptions.*—*Exclusion of Evidence.*—The ruling of a court upon the trial of an action, in refusing to permit a question to be answered by a witness, will not be reviewed by the Supreme Court, where the record does not show the particular facts which it was proposed to elicit by the question.

EVIDENCE.—*Expert.*—*Value of Board.*—The fact that a witness who testifies to the value of board is not an expert cannot constitute an objection to his evidence.

SAME.—*Hypothetical Question.*—Where, on the trial of an action, the value of services rendered by one of the parties for the other, in boarding and taking care of certain persons, was in issue, it was not error to admit, over objection, the answer of a witness to a question asking what such services would be worth under supposed circumstances stated, there being evidence tending to prove the existence of such circumstances.

INSTRUCTION TO JURY.—*Contract.*—*Quantum Meruit.*—On the trial of an action, the court refused to instruct the jury, at the request of the defendant, that there could be no recovery under the complaint, which

Chamness v. Chamness.

was a common count for services rendered, if there was a contract between the plaintiff and the defendant that such services should be performed by the plaintiff, and that he was to take his pay in the real estate of the defendant when the latter was "done with it."

Held, that there was no error in refusing the instruction, as it did not show sufficiently that it was based on an executory contract subsisting at the time; and if, as evidence introduced tended to prove, the defendant was "done with" his real estate, and had refused to make payment under the contract, before suit, the plaintiff might recover under such complaint.

SAME.—*Evidence*—It is error for a court, on the trial of an action, to instruct the jury as to the weight of evidence before them.

SAME.—*Request to Instruct More Fully.*—Where an instruction given to jury is correct as far as it goes, a party desiring that the jury should be more fully instructed should request an instruction embracing his views, and it will not avail him to object that such instruction given does not sufficiently state the law.

From the Henry Circuit Court.

Brown & Brown and *R. L. Polk*, for appellant.

M. E. Forkner and *E. H. Bundy*, for appellee.

BIDDLE, J.—Complaint by David Chamness, the appellee, against Nathan Chamness, the appellant, on a *quantum meruit* count, for board, washing, care, diligence, labor, etc., for the support and maintenance of Nathan Chamness, his wife and daughter, with a bill of particulars rendered.

Answer:

1. General denial.
2. Payment.
3. Set-off, for "boarding, clothing, keeping and taking care of plaintiff and his family, consisting of his wife and three children."
4. Set-off, "that the plaintiff is indebted to him in a large sum, to wit, in the sum of two thousand seven hundred and fifty dollars, upon account, a bill of particulars of which is filed herewith," etc.

Reply in denial, to the second, third and fourth paragraphs of answer. Trial by jury, verdict for appellee. Motion for a new trial overruled, exception taken, judgment, and appeal to this court.

Chamness v. Chamness.

1. An exception was taken to the excusing of a juror of the regular panel by the court, because he had served as a juror within the past year; but the question is not very seriously discussed by the appellant, and we can discover no error in the ruling.

2. At the proper time, the appellant introduced Henry Reynolds, a competent witness, and put to him the following question:

“State what you know, if anything, of David Chamness’ getting poplar timber off of his father’s farm, within the last three years, and selling it to you, and getting the money himself for it.”

An objection was made to this question by the appellee, and sustained by the court, “for the reason that no bill of particulars accompanied the answer.” The appellant excepted to the ruling of the court. The reason given for sustaining this objection is not sufficient. There was no demurrer to the answer, nor did the appellee move for a bill of particulars. These objections were therefore waived. *Hanna v. Pegg*, 1 Blackf. 180; *Davis v. Jenkins*, 14 Ind. 572; *Board of Comm’rs, etc. v. Ford*, 27 Ind. 17; *Wolf v. Schofield*, 38 Ind. 175; *Pierce v. Baird*, 48 Ind. 378; *McClure v. McClure*, 19 Ind. 185.

But the error of the court in placing its ruling upon an insufficient reason has not been made available here. It is not shown what evidence was proposed to be elicited by the question asked the witness. It is true, the appellant, in his brief, says, “When we offered this evidence, we informed the court that we expected to follow it by proof that the plaintiff received said lumber as a payment on his account.” But, upon diligent search, we are unable to find anything of the kind in the record. When the court below refuses to permit a question to be answered by a witness, the bill of exceptions must show the particular facts expected to be elicited, so that this court may judge of their materiality; otherwise, the error is not available. *Curry v. Bratney*, 29

Chamness v. Chamness.

Ind. 195; *Lewis v. Lewis*, 30 Ind. 257; *Adams v. Cosby*, 48 Ind. 153; *Baltimore, etc., R. R. Co. v. Lansing*, 52 Ind. 229.

Objections were sustained to several other similar questions for the same reasons given in the court below, which, for the reasons given here, cannot be made available.

3. The appellant complains, because the court, over his objection, allowed certain witnesses, who were not experts, to testify as to the value of board. There is no error in this. It does not require a knowledge of any particular science, art, or skill, to testify as to the value of board.

4. The appellee put the following question to a witness: "Supposing that the defendant and his wife was" [were] "unable to get to and from the table without help, and had to be helped at the table, and Abigail Chamness was insane, and it was necessary for some one to stay about the house all the time to take care of them; what would it be worth to board them and care for them per week, from October, 1870, to July, 1872?"

The court allowed this question, over the objection of the appellant, to be answered by the witness.

The appellant objects to this ruling, because the question is purely hypothetical, and therefore calculated to mislead the jury. There was evidence before the jury tending to show that "the defendant and his wife" were aged people, and somewhat helpless; and that Abigail Chamness was their daughter, and insane; and that the appellee boarded them while in that condition. We do not perceive, therefore, wherein the ruling was erroneous.

5. The appellant insists that there was evidence before the jury tending to prove a contract between the parties that the appellee was to board the appellant and his family, and take his pay therefor in the real estate of the appellant, after he "was done with it;" and, in this view of the case, the appellant requested the court to give the following instruction to the jury :

“If you find from the evidence that a contract existed between plaintiff and defendant, and that the contract was, that the plaintiff was to stay there and take care of the old people and their daughter, and he was to be paid for it out of the real estate, when the old man was done with it, the plaintiff cannot recover for such care in this action, under his complaint.”

The court refused to give this instruction to the jury, and the appellant excepted. The instruction is defective, as being applicable to the case assumed, because it does not show that “the old man was not done with his real estate;” in short, it does not sufficiently show that it was based on an executory contract subsisting at the time. For aught that appears by the instruction, “the old man” might have been “done with his real estate,” and refused to make payment under such a contract, before the commencement of the suit—and there is evidence in the case tending to prove these facts—if so, then the appellee might recover on the common count, as stated in his complaint. For these reasons, we think the court committed no error in refusing the instruction.

Another similar instruction was asked and refused, but need not be particularly noticed, as it rests upon the same principle just decided.

6. The appellant requested the court to give the following instruction to the jury:

“If you find from the evidence that the defendant told persons, other than the plaintiff or members of his family, while he was living with the plaintiff, that the plaintiff was taking good care of him, that he liked to live with him, and that he wanted him well paid for it, and that he intended to pay him, and that he intended the plaintiff should have the farm, or a part of it, these statements would not be sufficient to entitle the plaintiff to recover in this action, unless you find that there was a contract between the plaintiff and

Chamness v. Chamness.

defendant that the plaintiff was to be compensated for his services."

The court refused this instruction, and we think very properly. It amounts to instructing the jury as to the weight of evidence, which would be wrong under any circumstances.

7. The court gave the jury the following instruction:

"If you find that it was agreed and understood between the plaintiff and defendant that the plaintiff was not to be paid for the board and washing charged for in the complaint, and that the board was furnished and washing done by the plaintiff for the defendant with the understanding and agreement between them that the plaintiff was not to be paid for or receive anything therefor, then the plaintiff cannot recover for the same. But if it was agreed and understood between them, at the time the board and washing was" [were] "done and furnished, that the plaintiff was to be paid for the same, then he would be entitled to recover whatever the same were reasonably worth."

To the giving of this instruction the appellant excepted, and insists that, as the evidence tends to show that the parties lived together as one family, no implied contract would arise out of the facts which would entitle the appellee to recover for the board and services charged; that he could recover only upon an express agreement; and that, therefore, the charge is erroneous, or, at least, calculated to mislead the jury from the true issue in the case. Admitting that this view of the appellant is correct (*Smith v. Denman*, 48 Ind. 65), we cannot see that the instruction is erroneous. It might have been expressed in other words, giving the view insisted upon by the appellant more clearly; or the appellant might have requested an instruction embodying his views, and thus have raised the question; but we think the instruction, as far as it goes, is correct, and therefore not erroneous merely because it does not more fully state the law. *Boffandick v. Raleigh*, 11 Ind. 136; *Carpenter v. The State*, 43 Ind. 371; *Hamilton v. Elkins*, 46 Ind. 213.

The Cincinnati and Martinsville Railroad Co. v. Eaton, Administrator.

We have thus examined all the questions discussed on behalf of the appellant by his counsel, and are of opinion that there is no error presented in the record.

The judgment is affirmed, with costs.

53	307
181	86
53	307
134	566
53	307
153	165

THE CINCINNATI & MARTINSVILLE RAILROAD CO. v.
EATON, ADMINISTRATOR.

PLEADING.—*Injury or Death from Wrongful Act or Omission.*—A complaint for the death of a person caused by the wrongful act or omission of the defendant, is bad on demurrer, if it is not alleged therein that the person killed was not guilty of negligence contributing to his injury, or that he was without fault, and the facts alleged do not show that he was not guilty of such negligence, and it is not alleged that the defendant caused the injury wilfully or purposely, though it be alleged that the defendant inflicted the injury recklessly and with gross negligence.

From the Johnson Circuit Court.

S. P. Oyler, for appellant.

T. W. Woollen, for appellee.

WORDEN, C. J.—This was an action by the appellee against the appellant, to recover damages for the killing of the deceased, William Danly, by a locomotive engine, upon the appellant's railroad.

There were three paragraphs in the complaint, to each of which separate demurrers were filed, for want of sufficient facts. The demurrer was sustained to the second paragraph, but overruled as to the first and third, and the defendant excepted. Issues were joined, and the cause tried by a jury, resulting in a general verdict and judgment for the plaintiff.

Error is assigned upon the overruling of the demurrer to the third paragraph of the complaint. That paragraph is as follows:

The Cincinnati and Martinsville Railroad Co. v. Eaton, Administrator.

“And for a further and third cause of action in this behalf, the said plaintiff says that he is the administrator of the estate of said William Danly, deceased, (in which character he brings this suit) duly appointed and qualified; that heretofore, to wit, on the 3d day of October, 1873, the said defendant was the owner of and operating a certain line of railroad running from the town of Fairland, in the county of Shelby, along and through the county of Johnson, and State of Indiana, to the town of Martinsville, in the county of Morgan; that that part of said railroad in the said county of Johnson runs through the town of Trafalgar, in said county; and that the part thereof that runs through said town of Trafalgar passes over and along a space of ground which is used by the citizens of said town as a public highway, or thoroughfare, and over, along and across which they are in the habit of passing and repassing; that houses were and are erected on and fronting the said thoroughfare, on both sides thereof, and it was and is necessary for the citizens of said town and others, when in said town on business, to pass along, over and across the said public highway; that on said 3d day of October, 1873, the said defendant was running an engine and tender over and along that part of said road passing through said town of Trafalgar, and the said decedent was in said town waiting for the train going east, for the purpose of getting on the same as a passenger; that said road runs through said town from east to west, and said decedent was on the north side of said road, and near to the platform of the station, which was on the south side of said track; that owing to the situation of said road and the number of persons passing over, along and across the track of said road, it became and was the duty of said defendant to pass through said town slowly and with care, and not to exceed six miles per hour; that the said decedent, being on the north side of said track, and desiring to get on the platform of the station at said town of Trafalgar, for the purpose aforesaid, on hearing the whistle of the approaching train, which was about the time fixed by the time table of said

The Cincinnati and Martinsville Railroad Co. v. Eaton, Administrator.

road for the passing of the regular passenger train at said station, going east, started to cross the track of said road immediately east of said platform, having ample time to cross the same before the said train would pass the point of crossing, if the same had been run in a careful manner; that owing to a building located on said track and between the said decedent and the approaching train, the said decedent could not see said train until he got upon said track; that said defendant, in passing through said town at the time aforesaid, did not run slowly and with care, but recklessly and with gross negligence, in approaching and passing through said town, run their locomotive and tender aforesaid at the speed of from twenty to thirty miles per hour, and by means of said recklessness and gross negligence, the said defendant's engine ran against the said decedent, while crossing the track of said road, at the time and place aforesaid, and inflicted upon him, the said William Danly, injuries, from which he instantly died.

"And the plaintiff further says, that said William Danly, at the time of his death, was a resident of the State of Indiana, and left surviving him no widow, but the following children, who are his only heirs-at-law and next of kin, to wit: Mary Danly, aged — years; Sarah Danly, aged — years; and Nancy Danly, aged — years. Wherefore," etc.

The objection urged to this paragraph of the complaint is, that it fails to show that the deceased himself was guilty of no negligence which contributed to the injury; and, in our opinion, the objection is well taken.

In *Higgins v. The Jeffersonville, Madison and Indianapolis R. R. Co.*, 52 Ind. 110, it was held, that a complaint was defective which did not show, by averment, or by the facts alleged, that the person injured was guilty of no negligence which contributed to the injury.

In the paragraph under consideration, there is no averment that the decedent was guilty of no negligence contributing to the injury, nor that he was without fault; nor

t)

can we say that the facts alleged show that he was not guilty of such negligence. It seems to us that, although the deceased had time to cross the track after he heard the whistle, if the train had been run in a careful manner, and although he could not see the train, in consequence of the building, until he got upon the track, he might have been guilty of negligence in going upon the track without taking such precautions as were necessary to insure his safety. He knew the train was approaching, and we can by no means say that he was guilty of no negligence in going upon the track under the circumstances alleged. *The Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43.

If the paragraph had alleged that the injury was committed wilfully and purposely, the allegation that the deceased was guilty of no negligence would have been unnecessary; for if he had been wrongfully or negligently upon the track, that would not have justified the defendant in wilfully and purposely running upon him. *The Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239. But the allegations of the paragraph are not equivalent to such charge. It is alleged, that the train was run "recklessly and with gross negligence," and that, by means of said "recklessness and gross negligence," the engine ran against the deceased. This does not imply that the injury was inflicted either purposely or wilfully. The definitions of the word recklessness, as given by Worcester, are heedlessness, carelessness, negligence.

In the case of *The Lafayette, etc., R. R. Co. v. Adams*, 26 Ind. 76, it seems to us that the signification of the word recklessness was extended somewhat beyond its legitimate import; but however this may be, the complaint in that case contained the allegation that the injury was inflicted without negligence on the part of the plaintiff.

The demurrer to the paragraph, we think, was well taken, and should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

Kelley v. The State.

KELLEY v. THE STATE.

53	311
127	30
53	311
140	195
53	311
155	440

GRAND JURY.—*Selection After Commencement of Term.*—*Answer in Abatement.*—It was not a sufficient reason for the abatement of an indictment, that the grand jury which presented it—selected under a statute (2 Rev. Stat. of 1876, p. 417) providing that the persons chosen thereunder “shall constitute the grand jury of the county for the next ensuing two terms of the circuit court”—was selected after the commencement of the term of the circuit court at which the indictment was found.

CRIMINAL LAW.—*Instruction to Jury.*—*Manslaughter.*—On the trial of an indictment for murder, the court, in its charge to the jury, stated, “If you should find from the evidence, beyond a reasonable doubt, that the defendant, without malice, either express or implied, and with no intent to murder, unlawfully, involuntarily killed the decedent,” naming him, “this would be manslaughter,” the context of the charge giving the full statutory definition of manslaughter.

Held, that the defendant could not complain of the omission, in the portion of the charge quoted, of the words, “but in the commission of some unlawful act.”

SAME.—*Murder.*—*Indirect Cause of Death.*—Where wounds have been inflicted by one person upon another, and the latter afterward dies, it is not indispensable to a conviction of the former of murder or manslaughter, under an indictment based upon the infliction of such wounds, that they were necessarily fatal, and were the direct cause of the death; but if they caused the death indirectly, through a chain of natural effects and causes, unchanged by human action, it is sufficient in this regard.

SAME.—Where a person has inflicted wounds upon another, which are fatal, and of which the latter dies, or which are dangerous in themselves, though not necessarily fatal, and cause congestion of the brain, of which the wounded person dies, or congestion of the brain, so induced, causes the exposure of the injured person to the inclemencies of the weather, by which he dies, it must be held that the person who gave the wounds caused the death by the infliction of them.

From the White Circuit Court.

A. W. Reynolds and E. B. Sellers for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J.—John Kelley was indicted for the murder of Richard Herron. He answered the indictment by a plea in abatement, the substance of which is, that the grand jury which presented the indictment was selected by the board of commissioners of the county, on the 6th day of March,

The Cincinnati and Martinsville Railroad Co. v. Eaton, Administrator.

can we say that the facts alleged show that he was not guilty of such negligence. It seems to us that, although the deceased had time to cross the track after he heard the whistle, if the train had been run in a careful manner, and although he could not see the train, in consequence of the building, until he got upon the track, he might have been guilty of negligence in going upon the track without taking such precautions as were necessary to insure his safety. He knew the train was approaching, and we can by no means say that he was guilty of no negligence in going upon the track under the circumstances alleged. *The Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43.

If the paragraph had alleged that the injury was committed wilfully and purposely, the allegation that the deceased was guilty of no negligence would have been unnecessary; for if he had been wrongfully or negligently upon the track, that would not have justified the defendant in wilfully and purposely running upon him. *The Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239. But the allegations of the paragraph are not equivalent to such charge. It is alleged, that the train was run "recklessly and with gross negligence," and that, by means of said "recklessness and gross negligence," the engine ran against the deceased. This does not imply that the injury was inflicted either purposely or wilfully. The definitions of the word recklessness, as given by Worcester, are heedlessness, carelessness, negligence.

In the case of *The Lafayette, etc., R. R. Co. v. Adams*, 26 Ind. 76, it seems to us that the signification of the word recklessness was extended somewhat beyond its legitimate import; but however this may be, the complaint in that case contained the allegation that the injury was inflicted without negligence on the part of the plaintiff.

The demurrer to the paragraph, we think, was well taken, and should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

Kelley v. The State.

KELLEY v. THE STATE.

53	311
127	30
53	311
140	195
53	311
155	440

GRAND JURY.—*Selection After Commencement of Term.*—*Answer in Abatement.*—It was not a sufficient reason for the abatement of an indictment, that the grand jury which presented it—selected under a statute (2 Rev. Stat. of 1876, p. 417) providing that the persons chosen thereunder “shall constitute the grand jury of the county for the next ensuing two terms of the circuit court”—was selected after the commencement of the term of the circuit court at which the indictment was found.

CRIMINAL LAW.—*Instruction to Jury.*—*Manslaughter.*—On the trial of an indictment for murder, the court, in its charge to the jury, stated, “If you should find from the evidence, beyond a reasonable doubt, that the defendant, without malice, either express or implied, and with no intent to murder, unlawfully, involuntarily killed the decedent,” naming him, “this would be manslaughter,” the context of the charge giving the full statutory definition of manslaughter.

Held, that the defendant could not complain of the omission, in the portion of the charge quoted, of the words, “but in the commission of some unlawful act.”

SAME.—*Murder.*—*Indirect Cause of Death.*—Where wounds have been inflicted by one person upon another, and the latter afterward dies, it is not indispensable to a conviction of the former of murder or manslaughter, under an indictment based upon the infliction of such wounds, that they were necessarily fatal, and were the direct cause of the death; but if they caused the death indirectly, through a chain of natural effects and causes, unchanged by human action, it is sufficient in this regard.

SAME.—Where a person has inflicted wounds upon another, which are fatal, and of which the latter dies, or which are dangerous in themselves, though not necessarily fatal, and cause congestion of the brain, of which the wounded person dies, or congestion of the brain, so induced, causes the exposure of the injured person to the inclemencies of the weather, by which he dies, it must be held that the person who gave the wounds caused the death by the infliction of them.

From the White Circuit Court.

A. W. Reynolds and E. B. Sellers for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J.—John Kelley was indicted for the murder of Richard Herron. He answered the indictment by a plea in abatement, the substance of which is, that the grand jury which presented the indictment was selected by the board of commissioners of the county, on the 6th day of March,

The Cincinnati and Martinsville Railroad Co. v. Eaton, Administrator.

can we say that the facts alleged show that he was not guilty of such negligence. It seems to us that, although the deceased had time to cross the track after he heard the whistle, if the train had been run in a careful manner, and although he could not see the train, in consequence of the building, until he got upon the track, he might have been guilty of negligence in going upon the track without taking such precautions as were necessary to insure his safety. He knew the train was approaching, and we can by no means say that he was guilty of no negligence in going upon the track under the circumstances alleged. *The Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43.

If the paragraph had alleged that the injury was committed wilfully and purposely, the allegation that the deceased was guilty of no negligence would have been unnecessary; for if he had been wrongfully or negligently upon the track, that would not have justified the defendant in wilfully and purposely running upon him. *The Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239. But the allegations of the paragraph are not equivalent to such charge. It is alleged, that the train was run "recklessly and with gross negligence," and that, by means of said "recklessness and gross negligence," the engine ran against the deceased. This does not imply that the injury was inflicted either purposely or wilfully. The definitions of the word recklessness, as given by Worcester, are heedlessness, carelessness, negligence.

In the case of *The Lafayette, etc., R. R. Co. v. Adams*, 26 Ind. 76, it seems to us that the signification of the word recklessness was extended somewhat beyond its legitimate import; but however this may be, the complaint in that case contained the allegation that the injury was inflicted without negligence on the part of the plaintiff.

The demurrer to the paragraph, we think, was well taken, and should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

Kelley v. The State.

KELLEY v. THE STATE.

53	311
127	30
53	311
140	195
58	311
155	440

GRAND JURY.—*Selection After Commencement of Term.*—*Answer in Abatement.*—It was not a sufficient reason for the abatement of an indictment, that the grand jury which presented it—selected under a statute (2 Rev. Stat. of 1876, p. 417) providing that the persons chosen thereunder “shall constitute the grand jury of the county for the next ensuing two terms of the circuit court”—was selected after the commencement of the term of the circuit court at which the indictment was found.

CRIMINAL LAW.—*Instruction to Jury.*—*Manslaughter.*—On the trial of an indictment for murder, the court, in its charge to the jury, stated, “If you should find from the evidence, beyond a reasonable doubt, that the defendant, without malice, either express or implied, and with no intent to murder, unlawfully, involuntarily killed the decedent,” naming him, “this would be manslaughter,” the context of the charge giving the full statutory definition of manslaughter.

Held, that the defendant could not complain of the omission, in the portion of the charge quoted, of the words, “but in the commission of some unlawful act.”

SAME.—*Murder.*—*Indirect Cause of Death.*—Where wounds have been inflicted by one person upon another, and the latter afterward dies, it is not indispensable to a conviction of the former of murder or manslaughter, under an indictment based upon the infliction of such wounds, that they were necessarily fatal, and were the *direct* cause of the death; but if they caused the death indirectly, through a chain of natural effects and causes, unchanged by human action, it is sufficient in this regard.

SAME.—Where a person has inflicted wounds upon another, which are fatal, and of which the latter dies, or which are dangerous in themselves, though not necessarily fatal, and cause congestion of the brain, of which the wounded person dies, or congestion of the brain, so induced, causes the exposure of the injured person to the inclemencies of the weather, by which he dies, it must be held that the person who gave the wounds caused the death by the infliction of them.

From the White Circuit Court.

A. W. Reynolds and E. B. Sellers for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J.—John Kelley was indicted for the murder of Richard Herron. He answered the indictment by a plea in abatement, the substance of which is, that the grand jury which presented the indictment was selected by the board of commissioners of the county, on the 6th day of March,

The Cincinnati and Martinsville Railroad Co. v. Eaton, Administrator.

can we say that the facts alleged show that he was not guilty of such negligence. It seems to us that, although the deceased had time to cross the track after he heard the whistle, if the train had been run in a careful manner, and although he could not see the train, in consequence of the building, until he got upon the track, he might have been guilty of negligence in going upon the track without taking such precautions as were necessary to insure his safety. He knew the train was approaching, and we can by no means say that he was guilty of no negligence in going upon the track under the circumstances alleged. *The Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43.

If the paragraph had alleged that the injury was committed wilfully and purposely, the allegation that the deceased was guilty of no negligence would have been unnecessary; for if he had been wrongfully or negligently upon the track, that would not have justified the defendant in wilfully and purposely running upon him. *The Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239. But the allegations of the paragraph are not equivalent to such charge. It is alleged, that the train was run "recklessly and with gross negligence," and that, by means of said "recklessness and gross negligence," the engine ran against the deceased. This does not imply that the injury was inflicted either purposely or wilfully. The definitions of the word recklessness, as given by Worcester, are heedlessness, carelessness, negligence.

In the case of *The Lafayette, etc., R. R. Co. v. Adams*, 26 Ind. 76, it seems to us that the signification of the word recklessness was extended somewhat beyond its legitimate import; but however this may be, the complaint in that case contained the allegation that the injury was inflicted without negligence on the part of the plaintiff.

The demurrer to the paragraph, we think, was well taken, and should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

Kelley v. The State.

KELLEY v. THE STATE.

53	311
127	30
53	311
140	195
58	311
155	440

GRAND JURY. — *Selection After Commencement of Term.* — *Answer in Abatement.* — It was not a sufficient reason for the abatement of an indictment, that the grand jury which presented it—selected under a statute (2 Rev. Stat. of 1876, p. 417) providing that the persons chosen thereunder “shall constitute the grand jury of the county for the next ensuing two terms of the circuit court”—was selected after the commencement of the term of the circuit court at which the indictment was found.

CRIMINAL LAW. — *Instruction to Jury.* — *Manslaughter.* — On the trial of an indictment for murder, the court, in its charge to the jury, stated, “If you should find from the evidence, beyond a reasonable doubt, that the defendant, without malice, either express or implied, and with no intent to murder, unlawfully, involuntarily killed the decedent,” naming him, “this would be manslaughter,” the context of the charge giving the full statutory definition of manslaughter.

Held, that the defendant could not complain of the omission, in the portion of the charge quoted, of the words, “but in the commission of some unlawful act.”

SAME. — *Murder.* — *Indirect Cause of Death.* — Where wounds have been inflicted by one person upon another, and the latter afterward dies, it is not indispensable to a conviction of the former of murder or manslaughter, under an indictment based upon the infliction of such wounds, that they were necessarily fatal, and were the *direct* cause of the death; but if they caused the death indirectly, through a chain of natural effects and causes, unchanged by human action, it is sufficient in this regard.

SAME. — Where a person has inflicted wounds upon another, which are fatal, and of which the latter dies, or which are dangerous in themselves, though not necessarily fatal, and cause congestion of the brain, of which the wounded person dies, or congestion of the brain, so induced, causes the exposure of the injured person to the inclemencies of the weather, by which he dies, it must be held that the person who gave the wounds caused the death by the infliction of them.

From the White Circuit Court.

A. W. Reynolds and E. B. Sellers for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J. — John Kelley was indicted for the murder of Richard Herron. He answered the indictment by a plea in abatement, the substance of which is, that the grand jury which presented the indictment was selected by the board of commissioners of the county, on the 6th day of March,

The Cincinnati and Martinsville Railroad Co. v. Eaton, Administrator.

can we say that the facts alleged show that he was not guilty of such negligence. It seems to us that, although the deceased had time to cross the track after he heard the whistle, if the train had been run in a careful manner, and although he could not see the train, in consequence of the building, until he got upon the track, he might have been guilty of negligence in going upon the track without taking such precautions as were necessary to insure his safety. He knew the train was approaching, and we can by no means say that he was guilty of no negligence in going upon the track under the circumstances alleged. *The Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43.

If the paragraph had alleged that the injury was committed wilfully and purposely, the allegation that the deceased was guilty of no negligence would have been unnecessary; for if he had been wrongfully or negligently upon the track, that would not have justified the defendant in wilfully and purposely running upon him. *The Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239. But the allegations of the paragraph are not equivalent to such charge. It is alleged, that the train was run "recklessly and with gross negligence," and that, by means of said "recklessness and gross negligence," the engine ran against the deceased. This does not imply that the injury was inflicted either purposely or wilfully. The definitions of the word recklessness, as given by Worcester, are heedlessness, carelessness, negligence.

In the case of *The Lafayette, etc., R. R. Co. v. Adams*, 26 Ind. 76, it seems to us that the signification of the word recklessness was extended somewhat beyond its legitimate import; but however this may be, the complaint in that case contained the allegation that the injury was inflicted without negligence on the part of the plaintiff.

The demurrer to the paragraph, we think, was well taken, and should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

Kelley v. The State.

KELLEY v. THE STATE.

53	311
127	30
53	311
140	195
53	311
155	440

GRAND JURY. — *Selection After Commencement of Term.* — *Answer in Abatement.* — It was not a sufficient reason for the abatement of an indictment, that the grand jury which presented it—selected under a statute (2 Rev. Stat. of 1876, p. 417) providing that the persons chosen thereunder “shall constitute the grand jury of the county for the next ensuing two terms of the circuit court”—was selected after the commencement of the term of the circuit court at which the indictment was found.

CRIMINAL LAW. — *Instruction to Jury.* — *Manslaughter.* — On the trial of an indictment for murder, the court, in its charge to the jury, stated, “If you should find from the evidence, beyond a reasonable doubt, that the defendant, without malice, either express or implied, and with no intent to murder, unlawfully, involuntarily killed the decedent,” naming him, “this would be manslaughter,” the context of the charge giving the full statutory definition of manslaughter.

Held, that the defendant could not complain of the omission, in the portion of the charge quoted, of the words, “but in the commission of some unlawful act.”

SAME. — *Murder.* — *Indirect Cause of Death.* — Where wounds have been inflicted by one person upon another, and the latter afterward dies, it is not indispensable to a conviction of the former of murder or manslaughter, under an indictment based upon the infliction of such wounds, that they were necessarily fatal, and were the *direct* cause of the death; but if they caused the death indirectly, through a chain of natural effects and causes, unchanged by human action, it is sufficient in this regard.

SAME. — Where a person has inflicted wounds upon another, which are fatal, and of which the latter dies, or which are dangerous in themselves, though not necessarily fatal, and cause congestion of the brain, of which the wounded person dies, or congestion of the brain, so induced, causes the exposure of the injured person to the inclemencies of the weather, by which he dies, it must be held that the person who gave the wounds caused the death by the infliction of them.

From the White Circuit Court.

A. W. Reynolds and E. B. Sellers for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J. — John Kelley was indicted for the murder of Richard Herron. He answered the indictment by a plea in abatement, the substance of which is, that the grand jury which presented the indictment was selected by the board of commissioners of the county, on the 6th day of March,

Kelley v. The State.

1876, and that the term of court for which it served, and at which the indictment was presented, commenced on the 28th day of February, 1876. It is contended by the appellant, that, as the act under which the grand jury was selected (2 Rev. Stat. of 1876, p. 417) provides that the persons so chosen "shall constitute the grand jury of said county for the next ensuing two terms of the circuit court," therefore, the persons so chosen, and who presented the indictment, did not legally constitute the grand jury for the term which had commenced before they were selected. This, we think, would be too strict a construction of the act. The ensuing term of a court does not necessarily mean that the entire term shall ensue the selection of the grand jurors. A term of court may commence in one month, and extend into the next month, and, indeed, through many months, at any time during which the grand jury may present indictments, and that part of the time which follows the time at which the jury is selected may fairly be held as the ensuing term. This, we think, looking at the intention of the legislature, is a fair construction of the words used in the act; especially against an answer in abatement, which is not favored in law, and against which every intendment must be taken. *Ward v. The State*, 48 Ind. 289; *The Board of Commissioners, etc., v. The Lafayette, etc., R. R. Co.*, 50 Ind. 85, 117. We are of opinion, therefore, that the court committed no error in sustaining the demurrer to the answer in abatement. The facts alleged are not sufficient to abate the indictment.

The court, upon the trial, instructed the jury as follows:

"Manslaughter, as defined by the statute, is when one person unlawfully kills a human being, without malice, either expressed or implied, either voluntarily, upon a sudden heat or involuntarily, but in the commission of some unlawful act; so, in this case, if you find from the evidence, beyond a reasonable doubt, that the defendant, John Kelley, without malice, either express or implied, either voluntarily, upon a sudden heat of passion, but with no intent to murder, unlawfully killed the decedent, Richard Herron, this

Kelley v. The State.

would be manslaughter; or if you should find from the evidence, beyond a reasonable doubt, that the defendant, without malice, either express or implied, and without any intent to murder, unlawfully, involuntarily killed the decedent, Richard Herron, this would be manslaughter; or if you should be satisfied from the evidence, beyond a reasonable doubt, that the defendant, John Kelley, in the commission of an unlawful act, killed the decedent, Richard Herron, this also would be manslaughter; and, although the charge in the indictment is that of murder in the first degree, yet, under this charge, you may find him guilty of either murder in the second degree or manslaughter."

It is claimed, on behalf of the appellant, that this instruction is erroneous, especially this part: "Or if you should find from the evidence, beyond a reasonable doubt, that the defendant, without malice, either express or implied, and with no intent to murder, unlawfully, involuntarily killed the decedent, Richard Herron, this would be manslaughter." This part of the instruction, unconnected with what precedes and follows it, is not a full definition of the second branch of manslaughter, lacking the words, "but in the commission of some unlawful act;" yet this deficiency is nothing of which the appellant can complain. The want of completeness, if anything, is in his favor; besides, the full context of the instruction gives the definition of manslaughter in full. We can perceive no error in giving this instruction.

It is also insisted that the evidence is insufficient to support the verdict. We have read it and weighed it carefully. It is admitted that, on or about the 14th of January, 1876, blows were inflicted on the head of Richard Herron, causing serious wounds, and that afterwards he was found dead; but it is earnestly urged that the evidence is not sufficient to prove that Kelley inflicted the wounds, or that Herron died from the effects of the wounds so inflicted.

Touching the infliction of the wounds, John Toothman testified as follows: After stating that he knew the appellant and Richard Herron, he proceeded: "I last saw Rich-

Kelley v. The State.

ard Herron at Idaville, on Friday, January 14th, 1876, at Jack Kelley's, about ten o'clock of the day. I took a couple of letters down to the post office, and put the letters in the post office; I came back past Jack Kelley's house; I saw Jack Kelley strike Dick Herron two or three times with a hammer; I heard Dick say, 'Jack, don't kill me.' I mean Dick Herron; Dick is all his name. I pushed the door open and stepped into the door; Mr. Kelley let his hand drop with a hammer in it, and turned round, and he gave me a quart bottle, and told me to go to the drug store and get some whiskey. Dick Herron was leaning over the bed, and Kelley had hold of his right arm, I think."

Two of the appellant's daughters testify in the case. One states that she was at the house that day, and saw no fuss between her father and Herron; the other, that she was also there on the same day, and saw no difficulty between the parties. There was also some confusion in the statements of other witnesses, as to the time of day when Herron was afterwards seen in Idaville, and without any appearance of wounds or injury upon him, but nothing that substantially contradicts the testimony of Toothman. The daughters of Kelly might have been at the house on that day, and not have seen the blows inflicted upon Herron; others may have seen him at different times afterwards, on the same day, and easily have been mistaken as to the hour of the day; and he might have borne fatal wounds upon his head, without their showing any external appearance to casual observation. About a week afterwards, the body of Herron was found, with severe wounds upon the head, which facts also tend to support Toothman's statement as to the character of the wounds, and the part of the body upon which they were inflicted.

With regard to the question as to whether the wounds on the head caused the death of Herron, Dr. H. P. Anderson testified:

That he was a physician and surgeon; knew Herron; examined the wounds upon his head; there were eight or

Kelley v. The State.

nine; he described them; did not think Herron could survive; that his death was caused by the effect of the wounds upon his head. It was admitted that Herron was an intemperate man.

Dr. William Spencer testified:

"Am a physician; have practiced medicine and surgery since 1855; examined the wounds on Herron's head; they were in a very vital part; he would die within twelve or twenty-four hours after their infliction; think he died from the wounds and exposure; could not tell from the data what the cause of his death was; could not say that he had *delirium tremens* just previous to the infliction of the wounds; can't tell but that he might have frozen to death; don't know but he died of *delirium tremens*."

Dr. Robert J. Clark testified:

"Physician and surgeon; six years; knew Herron; examined his body; twelve or thirteen scalp wounds; dangerous; inflicted twelve or twenty-four hours before his death; blunt instrument; might have been a hammer; cause of his death congestion and exposure; think a healthy man would have frozen that night."

These are the essential points of the evidence bearing upon the cause of Herron's death. As his body had been exposed out of doors to the inclemencies of the season for several days before it was found, the counsel for the appellant strongly press the point that the evidence does not prove, beyond a reasonable doubt, that the wounds caused his death; that he might have died of congestion of the brain, or exposure to the cold weather. But it is not indispensable to a conviction, that the wounds were *necessarily* fatal, and were the *direct* cause of death. If they caused the death indirectly, through a chain of natural effects and causes, unchanged by human action, it is sufficient as to this point. The principle has been clearly and profoundly stated by Bar, an eminent German jurist, (*Die Lehre von Causalzusammenhange*, p. 11) as follows:

"A man is, in the eye of the law, the cause of a phenom-

Kelley v. The State.

enon, when he is the condition by which the regular sequences of the phenomena of human life are changed." And we believe this proposition has been fully sustained by the supreme court (Obertribunal) of Prussia, but perhaps carried farther in its application than American authorities would warrant. But the question has been long since carefully settled in England and America. Hawkins, in his Pleas of the Crown, vol. 1, p. 118, says:

"In what cases a man may be said to kill another; not only he who by a wound or blow, or by poisoning, strangling, or famishing, etc., directly causes another's death, but also in many cases, he who by wilfully and deliberately doing a thing which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him."

In Hale's Pleas of the Crown, vol. 1, p. 428, it is said:

"But if a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet, this is murder or manslaughter in him that gave the stroke or wound, for that wound, though it were not the immediate cause of his death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*."

In the reign of Charles II., "Edward Rew was indicted for killing Nathaniel Rew, his brother, and, upon the evidence, it was resolved, that if one gives wounds to another, who neglects the cure of them, or is disorderly, and doth not keep rule which a person wounded should do; yet, if he die, it is murder or manslaughter, according as the case is, in the person who gave the wounds, because if the wounds had not been, the man had not died; and, therefore, neglect or disorder in the person who received the wounds shall not excuse the person who gave them." J. Kel. 26.

According to the principles laid down by these ancient authorities, as applicable to this case, if Kelly, as charged,

Quigley v. Thompson.

inflicted the wounds upon Herron, and they were fatal, of which he died; or if they were dangerous in themselves, though not necessarily fatal, and the wounds caused the congestion of the brain, of which Herron died; or if the congestion of the brain caused his exposure to the inclemencies of the weather, by which he died; it must be held that Kelley, by the infliction of the wounds, caused the death of Herron. And these principles are fully supported by a continuous line of authorities, since they were first laid down as law. We cannot, therefore, depart from so well established a rule. *Regina v. Minnock*, 1 Crawf. & Dix C. C. 537; *Nixon v. The People*, 2 Scam. 267; *Regina v. Holland*, 2 Moody & Rob. 351; *Commonwealth v. M'Pike*, 3 Cush. 181; *McAllister v. The State*, 17 Ala. 434; *State v. Baker*, 1 Jones N. C. 267; *The Queen v. West*, 2 Car. & K. 784; *Parsons v. The State*, 21 Ala. 300; *State v. Scott*, 12 La. An. 274; *Dillon v. The State*, 9 Ind. 408; *Commonwealth v. Hackett*, 2 Allen, 136.

It is our opinion that the evidence fairly warrants the conviction, beyond a reasonable doubt.

We have thus carefully examined all the questions reserved in the record, and presented on behalf of appellant by his counsel, and are unable to find any error in the proceedings.

The judgment is affirmed.

Petition for a rehearing overruled.

QUIGLEY v. THOMPSON.

MAINTENANCE.—*Contract.*—By a contract between A. and B., the former agreed to pay the latter, or order, or bearer, a certain sum “as soon as a certain case or dispute” should be decided between A. and C., wherein C. claimed damages of A., if B. should manage said case, “as he has done,” and a suit should be commenced, and B. should, by himself and counsel, defend said cause, all at his own expense, and A. should have

Quigley v. Thompson.

no damages to pay ; said sum to be paid when said claim should be settled by law or otherwise, in favor of A., and nothing to be paid if A. should have any damages to pay. Suit on said contract against A. by B.'s assignee, the complaint alleging the execution and assignment thereof ; that, at the time of its execution, B. was acting as the agent of A. ; that B. had faithfully performed his part of the contract ; that said suit and dispute mentioned therein had been settled and determined in A.'s favor ; that B., by himself and attorney, had managed and defended said cause at B.'s expense ; that A. did not have any damages or costs to pay, etc.

Held, on demurrer to the complaint, that the contract was void for maintenance.

From the Lawrence Circuit Court.

F. Wilson, M. F. Dunn, P. A. Parkes and N. Crooke, for appellant.

G. Putnam and G. W. Friedley, for appellee.

BUSKIRK, J.—The first question presented by the record is, whether the court erred in overruling the demurrer to the complaint. The complaint and the instrument upon which the action is founded, with the indorsement thereon, are as follows :

“ Robert D. Thompson	} Lawrence Circuit Court, September Term, 1874.
“ Thomas Quigley.	

“ Robert D. Thompson complains of Thomas Quigley, and says that on the 8th day of October, 1870, the defendant, by his instrument in writing, filed herewith, promised to pay Jamison Lee two hundred dollars ; that said Lee assigned said written obligation to plaintiff, for a valuable consideration ; and plaintiff avers that said Lee, who had been acting as the agent and was then acting as the agent of the defendant, faithfully performed all his part of said contract, to the entire satisfaction of the defendant ; and plaintiff further avers, that said ‘ suit ’ and ‘ dispute ’ mentioned in said contract, between defendant and Samuel Foster, has been settled and determined in favor of the defendant ; that Lee, by himself and attorney, did ‘ manage ’ and ‘ defend ’ said cause at his own expense, and without cost or damage

Quigley v. Thompson.

to the defendant; and that defendant did not have any damage or costs to pay on account of said suit; wherefore, plaintiff says that said two hundred dollars is now due and wholly unpaid; that defendant has been often requested to pay the same by the plaintiff, but has heretofore refused and still refuses to pay the same, or any part thereof; and plaintiff demands judgment for three hundred dollars, and other proper relief.

“JAMISON LEE, Attorney for Plaintiff.”

Copy of Contract filed with complaint:

“State of Indiana, Lawrence county, October 8th, 1870. I have contracted and do agree with Jamison Lee on this day, to pay to said Lee, or order, or bearer, the sum of two hundred dollars, to be paid so soon as a certain case or dispute is decided between myself and Samuel Foster, where said Foster claims damages of said Quigley. Now, if said Lee manages said cause as he has done, and there is a suit commenced, and said Lee, by himself and counsel, defends said cause, all at Lee's own expense, and I do not have any damages to pay, and when said claim is settled by law, or otherwise, in my favor, then I am to pay two hundred dollars, as above; and if I have any damages to pay, then I am not to pay Lee anything, and he is to give the contract up to me. THOMAS QUIGLEY.”

Indorsement: “March, 1871. I assign the within contract to Robert D. Thompson. JAMISON LEE.”

It is contended by counsel for appellant, that the contract upon which this action is founded is void, by reason of maintenance.

We have never had, in this State, any statute on the subject of champerty and maintenance; but the common law and the English statutes on that subject have prevailed here since the year 1818. *Scobey v. Ross*, 13 Ind. 117.

The following definition is given by Blackstone:

“Maintenance is an offence that bears a near relation to the former” (barratry); “being an officious intermeddling

Quigley v. Thompson.

in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it; a practice that was greatly encouraged by the first introduction of uses. This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And, therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or patronage. A man may, however, maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity." 4 Bl. Com. 134.

"The distinction between maintenance and champerty seems to be this: Where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but, where he stipulates to receive part of the thing in suit, he is guilty of champerty." Note, p. 134, b. 4, Cooley's Bl. Com.; *Bell v. Smith*, 7 D. & R. 846; S. C. in 5 B. & C. 188; *Scobey v. Ross*, *supra*.

"But there are many acts in the nature of maintenance which become justifiable from the circumstances under which they are done. They may be justified, first, because the party has an interest in the thing in variance; as when he has a bare contingency in the lands in question, which possibly may now come *in esse* (Bacon, Abr. Maintenance); * * * second, because the party is of kindred or affinity, as father, son, or heir apparent, or husband or wife; * * * third, because the relation of landlord and tenant, or master and servant subsists between the party to the suit and the person who assists him; fourth, because the money is given out of charity, 1 Bail. So. C. 401; fifth, because the person assisting the party to the suit is an attorney or counselor; the assistance to be rendered must, however, be strictly professional, for a lawyer is not more justified in giving his client money than another man. 1 Russell, Crimes, 179; Bacon, Abr. Maintenance; Broke, Abr. Maintenance. This offence is punishable criminally by fine and imprisonment.

Hunt *et al.* v. The State, *ex rel.* Martin *et ux.*

4 Blackstone Comm. 124; 2 Swift Dig. 328. * * * See 3 Hawks, No. C. 86; 1 Me. 292; 11 Mass. 553; 6 Mass. 421; 5 Pick. Mass. 359; 5 T. B. Monr. Ky. 413; 6 Cow. 431; 4 Wend. 306; 14 Johns. 124; 3 Cow. N. Y. 647; 3 Johns. Ch. N. Y. 518; 7 D. & R. 846; 5 B. & C. 188." 2 Bouv. Law Dict. 90.

The contract sued upon very clearly comes within the above definition of maintenance, and does not come within any of the exceptions stated. We think the court erred in overruling the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the complaint.

HUNT ET AL. v. THE STATE, EX REL. MARTIN ET UX.

PRINCIPAL AND SURETY.—Guardian's Bond.—In an action on a guardian's bond, it is not a sufficient defence for a surety, that he signed the bond on the express condition that the principal obligor, before delivering it to the clerk, would have it signed by one or more other good, solvent men, as sureties with him, which was not done.

SAME.—Fraud.—Pleading.—In such an action, an answer by a sole surety is insufficient, which alleges that the bond was obtained from him by the principal obligor by fraud, covin and misrepresentation, by his stating that it should not be delivered to the clerk or to the judge, until it was executed by one or two other good, solvent persons as sureties.

GUARDIAN'S BOND.—Extent of Liability Thereunder.—The bond of a guardian, conditioned for the faithful discharge of his duties as guardian of the person and property of a person therein named and designated as the minor heir of a deceased person named, covers moneys of said ward's estate received by said guardian from other sources, as well as those received from the estate of said decedent; and the recovery in an action on such bond cannot be limited to the value of the estate mentioned in the statement made on the application for the appointment of the guardian, but may extend to the value of the whole estate of the

Hunt *et al.* v. The State, *ex rel.* Martin *et ux.*

ward, then held or afterward acquired, not exceeding the amount of the penalty of the bond, except proceeds of the sale of the ward's real estate by order of court.

From the Hendricks Circuit Court.

C. C. Nave, for appellants.

L. M. Campbell, for appellees.

DOWNEY, J.—This was an action by the State, on the relation of John V. Martin and Rebecca J. Martin, his wife. It was founded on the bond of Hunt, as the guardian of the female relatrix, and of Milo H. Moon, as his surety. The bond is in the usual form of such bonds given by guardians on their appointment, and was in a penalty of two thousand dollars. It was conditioned as follows:

“If the above bound Cyrus Hunt will faithfully discharge his duties as guardian of the person and property of William Hussey, Jesse Hussey, John Hussey, Lydia Hussey, Rebecca J. Hussey, and Jediah C. Hussey, minor heirs of Thomas Hussey, deceased, then the above obligation is to be void, else to remain in full force.”

It is alleged that the guardian settled and reported in full as to all his wards except the relatrix, and was discharged; that on the 11th day of June, 1872, he reported to the common pleas court, acknowledging that there was in his hands, due said relatrix, twenty-four hundred and twenty-two dollars and seventy-five cents; that since that time he has received from the First National Bank of Danville fifteen hundred dollars, and for rents of land five hundred dollars; the whole amounting to five thousand dollars; that he has converted the same to his own use; that although cited by the court and ordered to report further concerning the same and to pay the money into court, and although often requested to pay the same, he has wholly failed and refused to pay or account for the same, and has been removed from his trust as such guardian, by order of the court, and has converted to his own use all the money in his hands belonging to said ward. It is further alleged

Hunt *et al.* v. The State, *ex rel.* Martin *et ux.*

that said relatrix has intermarried with her co-relator, John V. Martin, a man of full age; wherefore, etc.

The defendant Hunt answered separately in four paragraphs, and Moon answered separately in six paragraphs. The defendants also answered jointly in one paragraph of set-off. A demurrer of the plaintiff to the third paragraph of the answer of Hunt, and to the first, second and third paragraphs of the answer of Moon was sustained by the court. Reply in denial. Trial by jury, and a general verdict for the plaintiff, for two thousand dollars, and answers to certain interrogatories propounded at the instance of the plaintiff. Motion by Moon for judgment in his favor on the special finding overruled. Motion by the defendants for a new trial and in arrest of judgment overruled, and judgment on the general verdict.

The errors properly assigned are:

1. Sustaining the demurrers to the second, third and sixth paragraphs of the answer of Moon.

2. Sustaining the demurrer to the third paragraph of the answer of Hunt.

3. Overruling the motion of Moon for judgment in his favor on the special findings.

4. Overruling the motion of the defendants for a new trial.

5. Overruling the motion of the defendants in arrest of judgment.

The first paragraph of the answer of Moon avers, in substance, that he signed the bond on the express condition that Hunt would, before delivery of said bond to the clerk, have it signed by one or more other good, solvent men as sureties with him, which was not done; wherefore the said writing is not his deed. This paragraph is sworn to by Moon.

We think there was no error in sustaining the demurrer to this paragraph of the answer. The case comes within the rule laid down in *Deardorff v. Foresman*, 24 Ind. 481, and cases following it. See *The Wild Cat Branch v. Ball*, 45 Ind. 213.

Hunt *et al.* v. The State, *ex rel.* Martin *et ux.*

The second paragraph of the answer of Moon alleges, in substance, that the bond was obtained by Hunt from him by fraud, covin and misrepresentation, by his stating that it should not be delivered to the clerk or to the judge of said court until it was executed or signed by one or two other good, solvent persons as sureties thereto. Wherefore, etc.

We think this paragraph is not good. There is no fraud properly alleged, and the doctrine of the cases already cited is applicable here.

In the sixth paragraph of the answer, it is alleged, that before the guardian was appointed, he filed in the office of the clerk a statement of the whole estate of the minors, and the probable value thereof, specifying the value of personal property and real estate separately, and the probable value of the annual rents and profits of the real estate, verified by affidavit, which amount was then and there fixed at five hundred dollars, the value of the personal property, and the rental value of the real estate at seventeen hundred dollars; and said Moon was thereafter called upon by said Hunt to sign his name as one of the sureties of him, said Hunt, to said bond, he, the said Hunt, then and there agreeing with him, said Moon, that he would also get one or two solvent men to sign their names to said bond as sureties thereto, before he would deliver the same to the clerk for approval; and relying on said promise, he signed the same, and upon no other or different understanding or agreement; but said Hunt, with the intention of cheating and defrauding him, presented said bond to the clerk for his approval, without the knowledge or consent of this defendant, and without getting any other person to sign the same, and the same was then and there approved by the clerk; that said Hunt, with the intention of cheating and defrauding him, etc., received a legacy of two thousand dollars from the estate of one Jediah Hussey, deceased, consisting of bank stock of the First National Bank of Danville, willed by said Jediah Hussey, to said Rebecca J. Hussey, long after the signing of the name of him, said Moon, to said writing, and with the

Hunt *et al.* v. The State, *ex rel.* Martin *et ux.*

intention aforesaid, afterwards, on the 15th day of June, 1872, reported to said court that he was then due the relatrix two thousand four hundred and twenty-two dollars and seventy-five cents, when, in fact, he was not then due her, of moneys by him received as her guardian from the estate of Thomas Hussey, deceased, one cent, he having before that time fully, for board, clothing and education, paid her all money, together with the interest accrued thereon, which was by him, her guardian, received from the estate of her deceased father, Thomas Hussey, and for which the said writing or bond was signed as aforesaid by him, the said Moon, and for no other or different purpose whatever, etc. Wherefore, etc.

So far as this paragraph relies upon the promise of Hunt to have the bond signed by other persons as sureties, before delivering it to the clerk, we need not remark upon it further than we have done in the consideration of the other paragraphs of the answer. Upon the other ground, we are of the opinion that the paragraph cannot be sustained. The bond of the guardian must be held to cover the money received from other sources, as well as from the estate of the father of the relatrix. The bond is not, by its terms, confined to moneys received from that source only. The fact that the wards are designated as "minor heirs of Thomas Hussey, deceased," cannot have that effect. Looking at sections four and five of the act relating to guardians, we conclude that the recovery on the bond cannot be limited to the value of the estate mentioned in the statement made on the application for appointment, but extends to the whole estate of the ward then held or afterwards acquired, except it may be the proceeds of the sale of real estate ordered to be sold by the court, in which case an additional bond is required. It is conceded that the liability of the surety cannot exceed the amount of the penalty of the bond. See *Colburn v. The State, ex rel., etc.*, 47 Ind. 310.

The third paragraph of the answer of Hunt relies upon the fact that he had paid all the money received by him

Higert v. The Trustees of Indiana Asbury University.

from the estate of the father of the relatrix. As this was not all the money of the ward alleged to have been received by the guardian, as we have seen, the paragraph was not a good bar to the action.

The other assignments of error do not present any additional question affecting the merits of the case.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

HIGERT v. THE TRUSTEES OF INDIANA ASBURY UNIVERSITY.

53	326
137	43
53	326
135	390

PLEADING.—*Demand.*—In an action upon a written contract for the payment of money at a time and place specified therein, the complaint will not be rendered bad on demurrer by a failure to allege therein a special demand of payment made upon the promisor before the commencement of the action.

SAME.—*Allegation that Claim Remains Unpaid.*—In an action upon a written agreement to pay money, it must appear from the complaint that the sum demanded remains unpaid; but in a complaint upon a subscription of money to the building fund of a college, this requirement was sufficiently complied with by an allegation that, “though often requested, the defendant has failed and refused and still fails and refuses to pay the same or any part thereof.”

CONSIDERATION.—*Mutual Promises.*—When a number of persons subscribe an instrument, whereby they agree to pay certain sums of money, severally, to be expended in the erection of a college building, their mutual promises constitute a sufficient consideration for the promise of each.

From the Putnam Circuit Court.

F. T. Brown and J. Hanna, for appellant.

S. Claypool, C. C. Matson and L. P. Chapin, for appellee.

BUSKIRK, J.—This action was based upon the following instrument:

“We, the undersigned, of the city of Greencastle and township of Greencastle, county of Putnam and State of

Higert v. The Trustees of Indiana Asbury University.

Indiana, do hereby agree to pay to the Indiana Asbury University, for the purpose of increasing and enlarging the building fund of said University, to be expended in a college building or buildings, in or near said city, one per cent. on the amount of property held by us, severally, in said city and township, as shown by the tax duplicate of said county, in the treasurer's office of said county. We further agree each to pay the additional sum of two dollars, and to pay said sums of money, at said treasurer's office, in said county, one-half at the time we severally pay our state and county taxes for the year 1870, and the other half when we severally pay our taxes for 1871. This subscription to be binding only upon the condition that not less than fifteen thousand dollars be made and raised for said purpose.

"ROBERT S. HIGERT" and others.

The complaint alleges the execution of the foregoing instrument by the appellant and many others; that the sum subscribed exceeded the sum of fifteen thousand dollars; that the property owned by the appellant, as shown by the tax duplicate, was eight thousand two hundred and fifty dollars; that there was due the sum of eighty-four dollars and fifty cents on said subscription; and though long since due, and being often requested, said defendant has failed and refused and still fails and refuses to pay the same or any part thereof. There was a demand for judgment for two hundred dollars, and other proper relief. The action was commenced on the 21st day of August, 1873. There was a demurrer to the complaint for the want of sufficient facts, which was overruled, and an exception taken. There was issue, trial by the court, and finding and judgment for appellee.

The errors assigned call in question the action of the court in overruling the demurrer to the complaint and the motion for a new trial.

The first objection urged to the complaint is, that it is not averred that the appellee made a special demand of payment of the appellant, before the bringing of the action.

Higert v. The Trustees of Indiana Asbury University.

The objection is not well taken. Both the time and place of payment are specified in the contract. *Bradfield v. McCormick*, 3 Blackf. 161; *Frazee v. McChord*, 1 Ind. 224; *Johnson v. Seymour*, 19 Ind. 24; *Fankboner v. Fankboner*, 20 Ind. 62; *McCullough v. Cook*, 34 Ind. 290; *Mercer v. Patterson*, 41 Ind. 440.

The second objection urged to the complaint is, that it is not averred that the sum subscribed remains unpaid. It is well settled, by repeated decisions of this court, that in an action upon an instrument containing an agreement to pay money, it must appear from the complaint that the sum demanded remains unpaid. *Lawson v. Sherra*, 21 Ind. 363; *Pace v. Grove*, 26 Ind. 26; *Michael v. Thomas*, 27 Ind. 501; *Howorth v. Scarce*, 29 Ind. 278; *Kent v. Cantrall*, 44 Ind. 452; *Stafford v. Davidson*, 47 Ind. 319. But it has never been held that the words "remains unpaid" must be used. These words are used in form No. 1, 2 G. & H. 373, which is a complaint upon a promissory note, and yet, in *Lawson v. Sherra, supra*, in speaking of a complaint founded upon a promissory note, it is said, that such form should, in its substantial requirements, be pursued, but it was added, "Perhaps it would be sufficient to adopt the old form, viz., that the defendant neglected and refused to pay the note, or any part thereof." In *Kent v. Cantrall, supra*, it is said: "The legislature having declared certain forms sufficient, we are required to hold such forms good, but where no form has been prescribed in a given case, we have to look to the principles and forms of pleading, as they exist at common law. *Shinloub v. Ammerman*, 7 Ind. 347."

Apply that rule to the present case. No form of a complaint upon the instrument which is the foundation of the present action has been prescribed by the legislature. We then look to the principles and forms of pleading, as they exist at common law, and, according to such principles and forms, the averments that, though often requested, the defendant has failed and refused, and still fails and refuses, to pay the same or any part thereof, are sufficient, and are

Higert v. The Trustees of Indiana Asbury University.

the equivalent of the words "remains unpaid," as used in said form.

The third objection urged to the complaint is, that the contract set out therein is void, for the want of consideration to support the promise. The brief of counsel for appellant evinces great research and ability in the discussion of this point, and we are referred to many cases which hold that the contract sued upon is void for want of consideration. The leading case relied upon is that of *The Trustees of Hamilton College v. Stewart*, 1 Comst. 581. There is a conflict in the authorities, which we shall not attempt to reconcile. There is a long line of decisions in this court which support and uphold the contract in question, and they are, *Johnson v. Wabash College*, 2 Ind. 555; *Peirce v. Ruley*, 5 Ind. 69; *Leviston v. The Junction R. R. Co.*, 7 Ind. 597; *Jewett v. Salisbury*, 16 Ind. 370; *Downey v. Hinohman*, 25 Ind. 453; *Davis v. Calloway*, 30 Ind. 112; *The Northwestern Conference of Universalists v. Myers*, 36 Ind. 375. The rule established by the foregoing cases is, in our judgment, in accord with the rule as it exists elsewhere. *George v. Harris*, 4 N. H. 533; *The Congregational Society, etc., v. Perry*, 6 N. H. 164; *The First Religious Society, etc., v. Stone*, 7 Johns. 112; *M'Auley v. Billinger*, 20 Johns. 89; *Underwood v. Waldron*, 12 Mich. 73; *Stewart v. The Trustees of Hamilton College*, 2 Denio, 403; *Trustees, etc., v. Stetson*, 5 Pick. 506; *Watkins v. Eames*, 9 Cush. 537; *The Trustees of Amherst Academy v. Cows*, 6 Pick. 427; *Thompson v. Page*, 1 Met. 565; *Ives v. Sterling*, 6 Met. 310; *Patchin v. Swift*, 21 Vt. 292; *Trustees Troy Conference Academy v. Nelson*, 24 Vt. 189; *Collins v. Case*, 23 Wis. 230; *Lathrop v. Knapp*, 27 Wis. 214; *Christian College v. Hendley*, 49 Cal. 347.

In the case last cited, it was held that, "if a number of persons subscribe to a paper, in which they promise to contribute money for the accomplishment of an object of interest to all, as the erection of a building for a college, and which object cannot be accomplished, save by their common

Higert v. The Trustees of Indiana Asbury University.

performance, their mutual promises constitute mutual obligations, and are a sufficient consideration to support the promise of each."

In *Lathrop v. Knapp*, *supra*, it is said by DIXON, C. J.:

"I am aware that the case of *Trustees of Hamilton College v. Stewart*, 1 Comst. 581, is in conflict with the principle here asserted. That case is cited and relied upon here, but I am not satisfied with the decision, and not disposed to follow it. It stands alone, or nearly so, and I think the authorities above cited, which constitute by far the greatest weight, lay down the sounder and better rule, and that which is more in harmony with reason and justice."

We are very clearly of opinion that the complaint is good, and that the court committed no error in overruling the demurrer thereto.

We next inquire whether the court erred in overruling the motion for a new trial.

It is, in the first place, claimed, that it does not appear from the evidence that fifteen thousand dollars were subscribed. We think differently. The evidence on that point, standing, as it does, unimpaired and uncontradicted, was sufficient to justify the verdict.

The second objection grows out of, and is clearly connected with, the first, and that is, that it does not appear that fifteen thousand dollars was subscribed by persons residing in Greencastle township, Putnam county, Indiana. There is nothing in the contract which requires that the subscribers should reside in said township.

We find no error in the record.

The judgment is affirmed, with costs.

DOWNEY, J., being president of the board of trustees of Indiana Asbury University, took no part in the decision of this case.

Shelton v. The State, *ex rel.* The Board of Com'rs of Morgan Co. *et al.*

SHELTON v. THE STATE, EX REL. THE BOARD OF COMMISSIONERS OF MORGAN CO. ET AL.

OFFICE AND OFFICER.—*Profit Derived by Officer from Public Money in his Custody.*—In this State, a public officer, as a county treasurer, who has received public money, with the custody of which he is charged by virtue of his office, in the absence of a statute providing that the ownership of the specific money shall remain in the public, is not, like a trustee or an agent, the mere bailee or custodian of such money, but it becomes his own money, and he can only be required to account for it and pay it over as provided by law and by the terms of his official bond, and cannot be required to account for and pay over amounts collected or received by him as interest on such money loaned to or deposited with a bank.

From the Morgan Circuit Court.

C. F. McNutt, G. W. Grubbs, G. H. Chapman, U. J. Hammond and J. J. Hawes, for appellant.

W. R. Harrison and W. S. Shirley, for appellees.

DOWNEY, C. J.—Action by and judgment for the appellees against the appellant. Two errors are properly assigned in this court. The first is the overruling of the demurrer of the defendant to the complaint, and the second, overruling the motion of the defendant for a new trial.

In the complaint, it is alleged, in substance, that on the 6th day of August, 1865, the defendant became and was the duly qualified treasurer of Morgan county, and continued to hold that office and to discharge the duties thereof, until the 6th day of August, 1871, during which time he had in his hands large sums of the public moneys of said county, being all the public moneys and funds of the county; that he deposited such funds in and with the First National Bank, in Martinsville, in said county, and received from said bank interest, profit and income for and upon the same, and for the use and deposit thereof, for and during the time aforesaid, two thousand one hundred and forty-one dollars and ninety-seven cents, a bill of particulars of which is filed, and which he converted to his own use; that the defendant ceased to be such treasurer on the said 6th day of August,

Shelton v. The State, ex rel. The Board of Com'rs of Morgan Co. et al.

1871, his successor therein having been duly elected and installed; yet the defendant has failed and refused to pay to his successor, etc., said sum so received for interest and profits on said money of the county, except, etc., leaving balance due one thousand six hundred and eighty-six dollars, the amount paid being the sum received by him after the passage of the fee and salary law of 1871. Wherefore, etc.

Following the complaint in the record is this agreement:

"I, Joseph R. Shelton, the within named defendant, hereby waive the issue and service of process on me in said action, and enter my appearance thereto. I further waive all objection to the form of the action, and that the same is not on my official bond, said action being brought in this form, and not on my bond, but against me alone, by agreement, at my instance, the object being to have determined, in the most direct and least expensive mode, whether I am liable for interest received by me on deposits of money in my hands, while acting treasurer of said county of Morgan. I reserve the right to demur to the complaint, on the ground that the facts stated do not make a cause of action against me, and, upon proper answer, to defend said action on its merits.

J. R. SHELTON."

"February 5th, 1872."

Any further statement of the facts, to show how the question for decision is presented, is deemed unnecessary. The question is this: Is the defendant liable to pay over the amounts collected and received by him as interest, as aforesaid, on the public moneys which came to his hands, and which were by him loaned to and deposited with the bank? The question is argued, with their accustomed ability, by counsel on both sides.

It is claimed by counsel for the appellees, that the money in the hands of the treasurer was so far trust funds, and the treasurer so far in a fiduciary relation to the county, or as an agent of the county, that all the profits made by him from

Shelton v. The State, *ex rel.* The Board of Com'rs of Morgan Co. *et al.*

loans of the money followed the ownership of the principal fund, and belonged to the county.

Counsel for the appellant, on the contrary, contend that the appellant did not stand in any fiduciary relation to the county or its funds, nor did he occupy the position of an agent of the county, and, consequently, was not liable to account for such interest.

Counsel for appellees cite and rely on the following authorities:

Docker v. Somes, 8 Eng. Ch. 172; Story Agency, secs. 16, 207, 210, 306; Dunlap's Paley's Agency, 49; *Diplock v. Blackburn*, 3 Camp. 43; *Earl of Lonsdale v. Church*, 3 Bro. C. C. 41; *Massey v. Davies*, 2 Ves. Jr. 317; *Michoud v. Girod*, 4 How. U. S. 503; 1 G. & H. 641, secs. 7 and 8; *Utica, etc., Co. v. Lynch*, 11 Paige, 520; *Barney v. Saunders*, 16 How. U. S. 535; *U. S. v. Prescott*, 3 How. U. S. 578; and *U. S. v. Morgan*, 11 How. U. S. 154.

Counsel for appellant cite the following authorities upon the main point:

2 Spence Eq. Jur. 917; 2 Story Eq. secs. 1268, 1272, 1273; *Brice v. Stokes*, 2 Lead. Cas. Eq., 4th ed., 1742, *et seq.*; *Supervisors, etc., v. Dorr*, 25 Wend. 440; *Muzzy v. Shattuck*, 1 Den. 233; *Inhabitants, etc., v. Hazzard*, 12 Cush. 112; *Inhabitants, etc., v. Bell*, 9 Met. 499; *Commonwealth v. Comly*, 3 Penn. St. 372; *U. S. v. Prescott*, *supra*; *East India Co. v. Henchman*, 1 Ves. Jr., 287; *Massey v. Davies*, *supra*; *Beaumont v. Boulton*, 7 Ves. 599; *Prevost v. Gratz*, Pet. C. C. 364; *Campbell v. Penn. Life Ins. Co.*, 2 Whart. 53; *Bartholomew v. Leech*, 7 Watts, 472; *Michoud v. Girod*, *supra*; *Barney v. Saunders*, *supra*; *Diplock v. Blackburn*, *supra*; *Newton v. Bennet*, 1 Bro. C. C. 359; *Perkins v. Bayntun*, 1 Bro. C. C. 375; *Foster v. Foster*, 2 Bro. C. C. 617; *Treves v. Townshend*, 1 Bro. C. C. 384; *Brown v. Litton*, 1 P. Wms. 140; *Ratcliffe v. Graves*, 1 Vern. 196; *Lee v. Lee*, 2 Vern. 548; *Hicks v. Hicks*, 3 Atk. 274; *Earl of Lonsdale v. Church*, *supra*; *Chedworth v. Edwards*, 8 Ves. 47.

Shelton v. The State, *ex rel.* The Board of Com'rs of Morgan Co. *et al.*

We cannot, in this opinion, examine specially all these authorities. None of them relate to the case where a public officer having the custody of money has made a profit by loaning it to or depositing it with another person or with a corporation; but they are cases where a trustee or an agent has made a profit by using, loaning or depositing the money of his *cestui que trust* or principal. We have not been referred to, nor have we found any case where the rule has been applied to a public officer. In this State, the rule of liability of officers charged with the custody of public mon-
eys is very strict. They have been held to almost, if not quite, the same degree of liability as if they were insurers of the safety of the money, and no degree of diligence or care has shielded them from such liability in case of its loss. This could not be held, according to well settled principles of law, if the officer was only the agent of the county, or the custodian of the money, the ownership of the specific money being in the county. If the specific money remains the property of the county, then the officer could not, with any propriety, be held liable for its loss, unless such loss accrued through his negligence. But such has not been held to be the measure of his liability. The liability has been held to grow out of the unconditional and unlimited engagement which the officer assumes in giving his official bond and taking upon himself the duties and responsibilities of the office. It is probably the correct rule, that when the officer has complied with the terms of his official bond, by keeping the money safely during the term of his office, by paying it out when legally required during his term, or accounting for and paying the same over to the proper person or authority at the expiration of his term, he has done all that the law and the terms of his bond require of him. He is not, like a trustee or an agent, the mere bailee or custodian of the money in his hands. The money which he receives becomes his own money, and when he has accounted as required by law and by the terms of his bond, nothing further can be required of him. *Rock v. Stinger*, 36 Ind.

The State v. Hannum.

346. If the legislature has provided, or shall provide, that money, in such case, shall remain specifically the money of the county, a different rule would prevail. No such regulation is found applicable to the money from which the profits were derived, that are in question in this case.

The judgment is reversed, with costs, and the cause remanded.

THE STATE v. HANNUM.

LIQUOR LAW.—*Selling Intoxicating Liquor to Minor.—Affidavit.*—In a prosecution by affidavit, under section 13 of the liquor law of 1875, (Acts 1875, Spec. Sess. 55) for unlawfully selling intoxicating liquor to a minor, the affidavit was not rendered bad by the fact that the liquor alleged to have been sold was described therein as “intoxicating liquor,” and not as either spiritous, vinous or malt liquor.

From the Allen Criminal Circuit Court.

C. A. Buskirk, Attorney General, and S. M. Hench, Prosecuting Attorney, for the State.

Stratton & Stratton, for appellee.

BIDDLE, J.—Prosecution before a justice of the peace by the State against the appellee, for unlawfully selling intoxicating liquor to a minor, founded upon the following affidavit:

“Harry Basler, being duly sworn, deposeth and says, that Daniel Hannum, on the 5th day of January, 1876, at said Allen county, and State of Indiana, unlawfully sold to this affiant, who was then and there a person under the age of twenty-one years, intoxicating liquor, to wit, the quantity of one gill of intoxicating liquor, for the price of ten cents, and further saith not.”

Conviction, fine, and judgment before the justice, and appeal to the criminal circuit court, wherein the affidavit, on

The State v. Hannum.

motion, was quashed. The State appeals to this court. The ground upon which the affidavit was held insufficient was, that it did not describe the liquor as either spiritous, vinous, or malt liquor, as expressed in the section upon which it is based. This is erroneous.

The second section of the act upon which this affidavit is founded (Acts Spec. Sess. 1875, 55) declares, that "the words 'intoxicating liquors' shall apply to any spiritous, vinous or malt liquors, or to any intoxicating liquors whatever, which is used or may be used as a beverage." The second section of the act of March 5th, 1859, 1 G. & H. 614, declares the same thing, under which it has been held, that the description of the liquor as "intoxicating liquor," was sufficient in all prosecutions of this kind; indeed, we believe it has been uniformly so held under all our "liquor laws," from the case of *The State v. Graeter*, 6 Blackf. 105, to the case of *Burke v. The State*, 52 Ind. 522, and from the act of January 20th, 1824 (R. S. 1824, p. 406), to the present statute. With a line of precedents running through so many years to support the rule, it is scarcely necessary at this day to give the reason of it, though it seems very plain. The act defines what intoxicating liquors shall include; there can be, therefore, no uncertainty about it, and no cause of surprise to the person accused. And such an allegation falls strictly within the principles of pleading. There are no more varieties of intoxicating liquors than there are of chairs, hats, gloves, of various animals, or of many other familiar objects; yet any of these may be described in a criminal pleading by their generic terms, and the description would be sufficient. It can not be inferred that the legislature intended that the pleader should describe the liquor, in prosecutions under one section of the act, differently from the description in prosecutions under any other section; but it seems clear, by giving the definition of the prohibited liquors in section second, that it was intended to describe them uniformly as "intoxicating liquors" in all prosecutions under the act.

The judgment is reversed, at the costs of the appellee;

Wright *et al.* v. Compton.

cause remanded, with instructions to overrule the motion to quash the affidavit, and for further proceedings.

WRIGHT ET AL. v. COMPTON.

MASTER AND SERVANT.—*Negligence of Servant.*—*Parties.*—For an injury resulting from the carelessness or negligence of a servant, while in the performance of his master's business, to a third person, the master is liable, and also the servant, and they may be joined as defendants in an action to recover damages for the injury.

NEGLIGENCE.—*Injury from Unlawful Act.*—Where a person, in quarrying stone, near a public highway, by a blast of gunpowder threw fragments of stone against a traveller passing on said highway, whereby he was injured, the act which caused the injury being unlawful, the recovery of damages for the injury could not be defeated by the fact that there was no negligence on the part of the person who did said act.

DAMAGES.—*Mental Suffering.*—*Pleading.*—In an action to recover damages for an injury to the person of the plaintiff, caused by the wrongful act or omission of the defendant, the jury, in estimating the amount of damages, may consider suffering and anxiety of mind of the plaintiff caused by such injury, as the plain consequences thereof, without special allegation of such suffering and anxiety of mind in the complaint.

From the Putnam Circuit Court.

G. A. Knight, for appellants.

S. W. Curtis, for appellee.

BIDDLE, J.—This action was originally brought in the Clay Circuit Court by Richard M. Compton, against Mansur H. Wright, Milroy Brackney, Franklin P. Cutshaw and Isaac King. The venue was changed to the Putnam Circuit Court. The complaint states the following facts:

"That on the 11th day of February, 1873, the defendant Mansur H. Wright was the owner of and operating a certain stone quarry, situated in Brazil township, Clay county, Indiana, and as such owner and operator, the said defend-

53	337
124	463

53	337
138	61

53	337
161	99

53	337
165	363

53	337
170	589

Wright *et al.* v. Compton.

ant had employed and engaged at work in and upon said stone his co-defendants, employed by him to dig and remove the stone from said quarry; that in the mining and removing of said stone from said quarry, the men so employed and at work for said Wright, with the said Wright's knowledge and consent, were in the habit [of drilling] and did on said 11th day of February, 1873, drill holes in the stone there located, and filled the same full of powder, and then and there communicated fire to the powder, for the purpose of breaking and loosening the rock situated in said stone quarry; that there is and was on said 11th day of February, a public highway, running past and near to said quarry, and at the point where said powder was used for the purpose aforesaid; that on said day, this plaintiff was passing along and upon said public highway, as he lawfully might do, with his wagon and team; that as he was opposite and near to said quarry, and where said blasting was done, the said defendants, then at work upon said stone, carelessly and negligently applied fire to the powder arranged as aforesaid, just as this plaintiff was at a point on said highway nearest to where said blasting was done, by reason of which large quantities of stone was [were] thrown in different directions, portions of which was [were] driven and thrown in great violence against and upon this plaintiff, then and there doing him great bodily harm, and inflicting upon his person dangerous and painful wounds, by reason of which he became and was sick, sore, and lame, and so continued for the period of ten weeks; that said wounds, so inflicted as aforesaid, prevented him from attending to his business and kept him confined to his house for and during all the said time; that by reason of said wounds, he is permanently disabled in his right leg, which prevents him from performing the duties of farming, by means of which he gained a livelihood; that he was forced to and did lay out and expend for medical and surgical attention large sums of money, to wit, five hundred dollars; that he was forced to and did lay out and expend the sum of fifteen [dollars] in and about trying to get cured

Wright *et al.* v. Compton.

and healed of said wounds; that, as such owner and workmen, said defendants knowingly, carelessly and wrongfully worked said quarry at all hours of the day, providing no known means to warn parties of their danger in passing along and upon said highway; that said injuries aforesaid, inflicted as aforesaid, were so done by the defendants without any fault or negligence on the part of this plaintiff; wherefore," etc.

The appellee afterwards dismissed his action as against Franklin P. Cutshaw and Isaac King. Wright, separately, and Wright and Brackney, jointly, demurred to the complaint, alleging as cause of demurrer the insufficiency of the facts averred to entitle the appellee to recover. The demurrers were overruled, and exceptions reserved. An answer in three paragraphs was filed, the second and third of which were struck out on motion, leaving the sole issue of the case on the general denial.

Trial by jury, verdict for appellee.

The usual motions were made, rulings had upon them, and exceptions taken to bring the case here.

The insufficiency of the complaint is strongly urged upon us, especially as against Wright, to hold him responsible for the acts of his quarrymen; but, in our opinion, it is good as against both Wright and Brackney. The general rule is, that a master is responsible for injuries to others resulting from the carelessness or negligence of his servants, while in the performance of the master's business.

The law is clearly and forcibly stated by FRAZER, J., in delivering the opinion of this court in the case of *The Evansville, etc., R. R. Co. v. Baum*, 26 Ind. 70, to which we fully adhere.

In addition to the authorities cited in that case, we add the following: *Bush v. Steinman*, 1 B. & P. 404; *The Philadelphia, etc., R. R. Co. v. Derby*, 14 How. U. S. 468; *Moore v. Fitchburg R. R. Corporation*, 4 Gray, 465; *Hewett v. Swift*, 3 Allen, 420; *Howe v. Newmarch*, 12 Allen, 49; *Ramsden v. Boston, etc., R. R. Co.*, 104 Mass. 117. That

Wright et al. v. Compton.

the servant is also liable for his own carelessness and negligence, and that the master and servant may be joined in the same action, are principles well settled.

The appellants requested the court to give the following instruction to the jury :

“The defendant, in the quarrying of stone near the public highway, had a right to use gunpowder; but, in employing so dangerous a material, he would be held to the exercise of extraordinary diligence and care, in preventing an injury to those who might pass over or along said highway; and if you find that this care and diligence were exercised by the defendant, or his agents, at proper times, and in a proper manner, as by warning travellers not to approach said quarry, or not to pass at the time when blasting was going on, and that such reasonable and proper precautions were observed as careful and prudent men would exercise under such circumstances, then the defendant would not be liable in this action to the plaintiff for damages, as he could not be said to be acting negligently or carelessly, while thus exercising every reasonable and proper precaution to prevent injury.”

The court refused this instruction, as it was requested, but modified and gave it as follows:

“The defendant, in the quarrying of stone near the public highway, had a right to use gunpowder; but, in employing so dangerous a material, he would be held to the exercise of extraordinary diligence and care, in preventing an injury to those who might pass over or along said highway; and if you find this care and diligence were exercised by the defendant, or his agents, at proper times, in a proper manner, by warning the plaintiff not to pass said quarry, because of an impending blast, and the plaintiff disregarded said warning, and, by so doing, contributed to his injury, then the defendant would not be liable in this action to the plaintiff for damages.”

We are of opinion that the court committed no error, either in refusing the instruction requested, or giving it as modified. The question involved is not one of negligence

Wright *et al.* v. Compton.

on the part of the defendants. The act charged against them is, in itself, unlawful—not the act of blasting and quarrying rock, but the act of casting fragments of rock upon the plaintiff, to his injury. When the act, in itself, is unlawful, it is immaterial whether it is done ignorantly, negligently, or purposely, except in the measure of damages. Every person must so use his property, and exercise his rights, as not to injure the property or restrict the rights of others.

In this case, the defendants could not lawfully so use their stone quarry as to embarrass the rights of travellers along the public highway.

The public travel must not be endangered, to accommodate the private rights of an individual.

In the case of *Hay v. The Cohoes Company*, 2 Comst. 159, where the company, while digging a canal upon its own land, in prosecuting the work, by a blast of gunpowder, threw fragments of rock against the dwelling-house of the plaintiff, whereby it was injured, it was held that the company was liable for the injury, although no negligence or want of skill, in executing the work, was alleged or proved.

GARDINER, J., in delivering the opinion, very properly remarks:

“A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner.”

So, we think, in this case, if the defendants cannot work their stone quarry without endangering the safety of travellers on the public highway, they must abandon it, or answer

Wright *et al.* v. Compton.

in damages for the injuries thus done. The same principle is held in the case of *Tremain v. The Cohoes Company*, 2 Comst. 163. See, also, *The Queen v. Mutters*, 34 L. J. Mag. Cases, 22.

Even where a person was killed by a blast of gunpowder, in a stone quarry, while passing along a foot-path, over the quarry lots owned by the defendants—the path having been habitually so used for many years—the question of negligence on the part of the deceased was left to the jury, whether such a use of the path would warrant the finding of a license to so cross the lots; and it was held that the defendants were liable. *Driscoll v. The Newark, etc., Co.*, 37 N. Y. 637.

Several other instructions, involving the same principles, are excepted to and brought before us, but they are disposed of in the above view of the law, and need not be particularly examined.

The court, after instructing the jury as to the rule of compensatory damages, used the following words in conclusion: "To which you may add such an amount as you, in your discretion, think will be a just compensation to the plaintiff for such suffering and anxiety of mind as are fairly and reasonably the plain consequences occasioned to him by the injury done." To this the appellants seriously object, because "there is no claim for damages in the complaint, based upon suffering and anxiety of mind." Nor need there be. It is not matter of special damages, and therefore need not be specially alleged; but it is the natural and direct consequence of the injury charged. Imaginary suffering and fanciful anxiety of mind would not be ground for damages; but suffering and anxiety of mind caused by corporal injuries may be considered by the jury in estimating the amount of damages. *Taber v. Hutson*, 5 Ind. 322; *Cox v. Vanderkleed*, 21 Ind. 164; *Fisher v. Hamilton*, 49 Ind. 341. And we think the evidence fully sustains the verdict.

The appellants have shown us no error in the record
The judgment is affirmed, with costs.

Wolfington *et al.* v. The State.

JACKSON ET AL. v. REEVES.

From the Steuben Circuit Court.

D. E. Palmer, J. A. Woodhull and W. G. Croxton, for appellants.

BUSKIRK, J.—This case is, in all of its legal aspects, the same as the one between the same parties, decided on the 23d day of November, 1876, *ante*, p. 231. The judgment is reversed for the same cause, and the cause is remanded with the same directions as in the above case.

WOLFINGTON ET AL. v. THE STATE.

NEW TRIAL.—*Motion*.—Motion for a new trial in a criminal action assigning as cause, that “the jury has received evidence that was illegal, admitted by court.”

Held, that this was too indefinite.

CRIMINAL LAW.—*Larceny*.—*Lost Goods*.—When a finder of lost goods takes possession thereof and appropriates them to his own use, without knowing, at the time of first taking possession, who is the owner, and without having reasonable means of then knowing that fact, such taking and conversion cannot constitute larceny.

From the Orange Circuit Court.

A. J. Simpson, for appellants.

C. A. Buskirk, Attorney General, and *R. W. Miers*, Prosecuting Attorney, for the State.

DOWNEY, J.—This was an indictment for larceny against the appellants together with one Isaac Phillips.

Phillips was not found. The other defendants pleaded not guilty.

Upon trial by a jury, they were found guilty. A motion made by them for a new trial was overruled, and they were sentenced according to the verdict.

Wolfington *et al.* v. The State.

The only error properly assigned is the refusal to grant a new trial.

One cause for a new trial, which is argued by appellants, is, that certain evidence against them was improperly admitted on the trial.

This ground is stated in the motion for a new trial as follows:

“The jury has received evidence that was illegal, admitted by the court.”

This cause for a new trial is entirely too indefinite to enable or to authorize us to decide anything with reference to it. *Blakely v. The State*, 52 Ind. 161. There are many other cases to the same effect.

The other question made under this assignment is as to the sufficiency of the evidence to justify the verdict of the jury. We have carefully read the evidence, and are of the opinion that it is not sufficient.

The indictment is in two counts. The first charges a larceny of certain treasury notes, or greenbacks, and a pocket-book, the property of one Theophilus C. Ritter; and the second charges the larceny of certain national bank notes and a pocket-book, the property of the same person.

The evidence tends to show that Ritter lost his pocket-book, containing the money, on the public highway, in May, 1873; that his name and that of his post office were written in the pocket-book in two places; that there were two promissory notes in the pocket-book, payable to Ritter; that afterwards Shaver confessed to him that he and the other defendants found the pocket-book, that Phillips snatched the pocket-book out of his hands, that they opened it and divided the contents, that this confession was eighteen months after the finding of the pocket-book, and that he, Shaver, had never since seen the pocket-book or its contents.

Shaver told Shively, another witness, that they found the pocket-book, and that he would have given it up, but the

Wolfington *et al.* v. The State.

others would not let him, and that the pocket-book had money in it, but he did not know how much.

Shaver also said to one Daugherty, another witness, that they found the pocket-book in the road, near Day's; that Phillips snatched the pocket-book from him.

Farrell, another witness for the State, testified that Wolfington said that he got two dollars and seventy-five cents in money, found in a pocket-book near Day's; and that he said he did not know whose it was.

Tindall, another witness for the State, said that he and Wolfington were in jail together in September, 1874, and Wolfington said to him that it was all spite work in the prosecution, that they had found a pocket-book, but he did not know whose it was, and that he did not see it opened.

Wolfington testified in the defence, that he, Shaver and Phillips, were going along the road in a wagon; that he was riding the saddle horse; that Shaver said, "Stop!" that he was about to lose his pocket-book; that Shaver got down, and he saw that he had a pocket-book in his hands; that Phillips snatched it from Shaver's hands and put it in his, Phillips', pocket.

After they had gone some distance, something was said about whose pocket-book it was.

Phillips said, "Maybe it is old man Winnegar's;" Shaver said it might be Dr. Ritter's; that he never had the pocket-book in his hands, never saw it opened, never saw it after Phillips snatched it from the hands of Shaver.

While they were travelling along the road, Phillips said to him: "Wolfington, would you treat, if you had the money?" "I said, 'Yes.' Then Phillips gave me two dollars and seventy-five cents. We did not know where Phillips got the two dollars and seventy-five cents;" and that they bought some bitters with the money.

Shaver testified that he and Wolfington and Phillips were going along the road in a wagon; that he saw a pocket-book in the road; that he got down and picked it up; that then and there Phillips snatched it out of his hands;

Wolfington *et al.* v. The State.

that he never saw it afterwards, never saw it opened, never saw anything that was in it, then or afterwards; that he did not know whose it was; that he could not read writing; that Ritter came to him in the field, where he was at work, in a rough and threatening manner; that Ritter told him that he had stolen the pocket-book, that he need not deny it, that he could prove it on him; that he was afraid Ritter would take his life; that he made a statement to Ritter, through fear that Ritter would take his life; that Ritter demanded of him a note for fifty dollars; that he gave him his note for fifty dollars, ten of which were for doctor's bill, and forty to compromise this prosecution; and that he did not owe Ritter fifty dollars for medical attendance. Ritter's statement, with reference to the note given to him by Shaver, was, that he had made three or four medical visits to the house of Shaver, a distance of three miles, and that the note was given for such visits.

The law with reference to the larceny of lost goods is not very well settled. It seems to be settled, 1. That the felonious intent must exist at the time when the finder takes possession of the goods; and that if such intent does not then exist, but the finder afterwards forms that intent and conceals the goods, or appropriates them to his own use, it is not larceny. The existence or non-existence of such intent, at the time of taking possession of the goods, must be found from all the facts and circumstances attending the transaction, as in any other case. 2 Bishop Crim. Law, sec. 881, *et seq.* 2. If the finder of the goods, at the time, knows the owner of the goods, and, with such knowledge, converts them to his own use, he is guilty of larceny. This knowledge of ownership may be derived either from having previously seen the goods in the possession of the owner, from marks upon them, or in any other way. 2 Bishop Crim. Law, sec. 882.

In *The Commonwealth v. Titus*, 116 Mass. 42, the court laid down the rule as follows:

“The finder of lost goods may lawfully take them into his

possession, and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to appropriate them to his own use and to deprive the owner of them, and then knows or has the reasonable means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny."

In *The People v. Cogdell*, 1 Hill, 94, the law was laid down in substantially the same terms. See, also, *The People v. M'Garren*, 17 Wend. 460.

In *The State v. Weston*, 9 Conn. 526, the defendants found a pocket-book in the highway, containing bank bills, and converted the property to their own use. The name of the owner was legibly written in the pocket-book, and it was proved that the defendants could read. The conviction was held good.

BISHOP, *supra*, says: "Some of the cases say, if he" (the finder) "knows who the owner is, or has the means of ascertaining; but the better doctrine is as above set down, because every man by advertising and inquiring can find the owner, if he is to be found, while the guilt of a defendant must attach at the moment, if ever, without depending on an if"

If the finder does not know, and has not, at the time of taking possession of the goods, the means of then knowing the owner, the case is one of trover and conversion, and not of larceny.

It appears, in the case under consideration, that Shaver could not read, and that the pocket-book was taken out of his hands immediately after he picked it up; that he never saw it afterwards, nor anything that was in it. The evidence on behalf of the State does not show that Shaver knew who owned the pocket-book, or that he had the means, at the time, of ascertaining that fact.

The evidence against Wolfington is still less satisfactory.

Edwards *et al.* v. Haverstick, Administrator.

In our judgment, the evidence does not prove a case against the defendants coming within the law as we have stated it.

The judgment is reversed, and the cause remanded for a new trial; and the clerk will certify to the warden of the state prison, according to law.



53	348
130	501
53	348
138	481

EDWARDS ET AL. v. HAVERSTICK, ADMINISTRATOR.

FRAUDULENT CONVEYANCE.—*Effect of.*—A conveyance of real estate, made for the purpose of hindering or delaying creditors of the grantor, is legal and binding as between the parties and as to all others than such creditors, and the real estate is subject to levy and sale under an execution against the grantee, and another conveyance thereof, subsequently made by said grantor, can pass no title.

EXECUTION.—*Replevin Bail.*—An execution plaintiff cannot be required, before proceeding against the property of replevin bail, to resort to real estate of the judgment defendant which has been duly and legally sold by the sheriff, for much less than its value, under a prior judgment in favor of another plaintiff against the same defendant, who has no other property subject to execution, said execution plaintiff having the right to redeem said real estate from said sale.

From the Hamilton Circuit Court.

J. W. Evans and *R. R. Stephenson*, for appellants.

BUSKIRK, J.—This is the second time this case has been in this court. It is reported in 47 Ind. 138. The material facts of the case will be found in the former statement of the case. The judgment was then reversed for want of sufficient averments in the complaint. Upon the return of the case, the complaint was amended, so as to conform it to the ruling of this court. It is assigned for error in this court, that the complaint does not contain facts sufficient to constitute a cause of action. We think differently. The complaint is now sufficient, and conforms to the former ruling of this court. The issues were reformed and were submit-

Edwards et al. v. Haverstick, Administrator.

ted to the court for trial, who, at the request of the parties, found the facts specially, with conclusions of law, to which an exception was taken. It is assigned for error, that the court erred in its conclusions of law. The special findings and conclusions of law are as follows:

“Be it remembered that the above cause, coming on to be heard, was, by agreement of parties, submitted to the court for trial; and the court, having heard all the evidence, and being sufficiently advised, at the request of the defendants, does make a special finding of the facts in the case, and its conclusions of law therefrom, as follows:

“The court finds specially that the forty-acre tract of land mentioned and described in the complaint as belonging to Joseph Huston, was, on the 31st day of December, 1871, conveyed to him by the then owner thereof, one John Richardson, without any consideration whatever, which conveyance was so made by said Richardson to said Huston for the purpose of defrauding the creditors of the said Richardson, of which fraudulent intent the said Huston then and there had knowledge; that about three months after said transfer to said Huston by said Richardson, to wit, in March, 1872, said Huston's wife, Margaret, with the consent and at the request of her husband, and for the purpose of defrauding the creditors of the said Joseph Huston, bought said land of said Richardson, and paid for the same the sum and price of sixteen hundred dollars. After the purchase of said tract of land by her as aforesaid, she moved on and took possession of the same, in pursuance of her said purchase, with the consent of Richardson, who subsequently moved off, and has continued thereon ever since with her said husband. The court finds that the purchase of said tract of land by said Margaret was made for the purpose of defrauding the creditors of the said Joseph Huston, for a price unknown to the court.

“The court finds that said Joseph Huston was, at the date of the defendant Clark's execution, and still is, indebted in the sum of about five hundred dollars, and that he had not, at the date of said execution, and has not had since, any

Edwards et al. v. Haverstick, Administrator.

property subject to execution, except the real estate above described, and one horse, of the value of seventy-five dollars, and one wagon of the value of twenty-five dollars; that said real estate is of the value of two thousand dollars; and that said Huston is a resident householder of Hamilton county, Indiana. The court further finds that all the matters set forth in the plaintiff's complaint, including the copies and exhibits thereto attached, and the officer's return thereon, are true as therein alleged, except as to the amount of personal property subject to execution owned by said Joseph Huston. And the court finds that the fee simple of the forty-acre tract of land above mentioned, and also described in the complaint, and referred to in the answer, was, on the 7th day of February, 1874, duly and legally sold by the Sheriff of Hamilton county, Indiana, for two hundred dollars, upon the execution of one P. P. Whitsell, which execution was issued upon a judgment against Joseph Huston in favor of said Whitsell, in the Hamilton Circuit Court, which judgment was a prior lien on said land to the defendant Clark's judgment and execution. The court finds further that the title to said lands is in litigation. The court further finds that after the sale on said Whitsell's judgment of the fee simple of said land, and after said Whitsell had received a sheriff's certificate for the same, said Clark abandoned his levy thereon, and finding no other property belonging to said Huston, subject to execution, and after demanding personal property of the plaintiff in this cause, and failing to find any subject to execution belonging to the plaintiff's decedent, thereupon directed the sheriff to levy upon the town lot mentioned and described in the complaint, which lot was subject to execution, and was proceeding to sell the same upon his said execution, when restrained by an order of the court made in this cause. And the court, as a conclusion of law from the foregoing facts, finds that the forty-acre tract of real estate, described in the complaint and mentioned in the finding, to wit, the southwest quarter, northwest quarter, section eight, township

Edwards *et al.* v. Haverstick, Administrator.

eighteen, range six, east, in said county and state, was, at the date of the issuing of the defendant Clark's execution, the property of Joseph Huston, and subject to the lien of the same; and the court finds that the defendant Huston has no other property subject to execution; the pretended purchase thereof by said Margaret Huston was a nullity, said Richardson having no title thereto, and could convey none to her. That said land not having been sold for near its full value on said Whitsell's judgment, the defendant Clark is bound in law to first exhaust the same by levy and sale before going on to the property of the plaintiff's decedent, who was replevin bail. To which conclusion of law the defendants at the time objected and excepted.

"HARVEY CRAVENS, Judge."

The replevin bail is a surety merely, and is entitled to all the protection and immunity of other sureties. Hence, his property cannot be levied upon until the property of the principal, subject to levy and sale upon execution, has been exhausted. *Elson v. O'Dowd*, 40 Ind. 300. It becomes necessary, therefore, to inquire whether Huston, the principal judgment debtor, had, at the time the levy was made upon the property of the replevin bail, any property which was subject to levy and sale upon execution. It is obvious that, aside from the forty-acre tract of land conveyed to him by Richardson, he had no property that was subject to levy and sale upon execution. Did he acquire a valid title to such tract of land? It is found by the court that such land was conveyed to him by Richardson without any consideration moving from Huston, and for the purpose of defrauding the creditors of Richardson.

It is firmly settled by repeated decisions in this State, that a contract for the sale or conveyance of property, to hinder or delay creditors, is illegal as to creditors only. As between the parties, and as to all others than creditors, it is legal and valid, and can be enforced in all of its terms as any other contract. *Findley v. Cooley*, 1 Blackf. 262; S. C., Buskirk's Table of Cases, with cases cited as following it;

Edwards *et al.* v. Haverstick, Administrator.

Springer v. Drosch, 32 Ind. 486; *Fouty v. Fouty*, 34 Ind. 433; *O'Neil v. Chandler*, 42 Ind. 471.

The conveyance from Richardson to Huston vested the title in the latter, subject to the right of the creditors of the former to have it divested and the property subjected to sale for the payment of their debts. We are not advised that the creditors of Richardson have ever complained of such illegal and fraudulent conveyance. The conveyance vested a fee simple in Huston, and subjected the land to levy and sale for the payment of his debts.

It is further found by the court, that subsequent to such conveyance, the wife of Huston purchased the said tract of land of said Richardson, and paid therefor the sum of one thousand six hundred dollars; that Richardson conveyed the same to Mrs. Huston, who had taken possession, with her husband, and had since occupied it; and that this sale and conveyance were for the purpose of defrauding the creditors of Huston. We are unable to see how this last conveyance could have been made for the purpose of defrauding the creditors of Huston, as Mrs. Huston paid in cash, of her own money, nearly the value of such land. But, however this may be, we think that Mrs. Huston acquired no title by such conveyance, for the plain and obvious reason that Richardson possessed no title to such land, he having conveyed the fee simple title to Huston. *Nichol v. McCalister*, 52 Ind. 586.

It is further found by the court, that the fee simple of the forty-acre tract of land above mentioned was, on the 7th day of February, 1874, duly and legally sold by the sheriff of Hamilton county, Indiana, for two hundred dollars, upon the execution of one P. P. Whitsell, which execution was issued upon a judgment against Joseph Huston, in favor of said Whitsell, in the Hamilton Circuit Court, which judgment was a prior lien on said land to the defendant Clark's judgment and execution.

The court finds, as a conclusion of law upon the above facts, that, said land not having been sold for near its full

Edwards *et al.* v. Haverstick, Administrator.

value on said Whitsell's judgment, the defendant Clark is bound in law to first exhaust the same by levy and sale, before going on the property of the plaintiff's decedent, who was replevin bail.

We think the court erred in its conclusion of law. The land was sold upon an execution issued upon a judgment which was a prior lien. The court found it was "duly and legally sold." The title of Huston would be divested by the sheriff's sale and conveyance. There was nothing to sell. The only remedy was to redeem the land, and we do not think the judgment plaintiff was required to redeem the land and then subject it to sale, before he could proceed against the replevin bail. The execution plaintiff is required to exhaust the property of the judgment defendant, subject to sale upon execution, before he can proceed against the property of the replevin bail, but more than this he is not required to do. *Nunemacher v. Ingle*, 20 Ind. 135; *Niles v. Stillwagon*, 22 Ind. 143; *Elson v. O'Dowd*, 40 Ind. 300.

The property of Huston having been sold upon an execution issued upon a judgment which was a prior lien to the judgment in question, the replevin bail might have protected himself by redeeming the property from sale and compelling it to bring enough to satisfy both judgments. The judgment plaintiff might have done the same thing, but he was not required to do so before proceeding against the property of the replevin bail.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to dissolve the injunction, and to render a judgment for the appellants upon the special finding of facts.

The State v. Throckmorton.

THE STATE v. THROCKMORTON.

CRIMINAL LAW.—*Assault, or Assault and Battery, With Intent to Commit Manslaughter.*—Under section 9, 2 G. & H. 438, prescribing a penalty for the perpetration of an assault, or an assault and battery, with intent to commit a felony, an indictment will lie for an assault, or an assault and battery, with intent to commit voluntary manslaughter.

SAME.—*Indictment.—Offence of Different Degrees.*—Under an indictment for an assault, or an assault and battery, with intent to commit murder in the first degree, if the evidence justify it, there may be the same conviction as under an indictment for an assault, or an assault and battery, with intent to commit manslaughter. Therefore, where there was a trial and acquittal under a count for an assault and battery with intent to commit murder, the judgment could not be reversed for the quashing of a good count for assault and battery with intent to commit manslaughter.

From the Allen Criminal Circuit Court.

C. A. Buskirk, Attorney General, and *S. M. Hench*, Prosecuting Attorney, for the State.

Stratton & Stratton, for appellee.

DOWNEY, J.—The appellee was indicted of an aggravated assault and battery. The indictment was in two counts, the second of which was, on motion of the defendant, quashed by the court, and the question was reserved by the prosecuting attorney.

The second paragraph is as follows:

“The grand jurors aforesaid, upon their oath aforesaid, do further charge and present that Henry Throckmorton, at said county of Allen, and State of Indiana, on the 7th day of October, A. D. 1875, in and upon one William Meredith, did make an assault, and him, the said William Meredith, did then and there feloniously and unlawfully touch, in a rude, insolent and angry manner, with intent, then and there and thereby, him, the said William Meredith, unlawfully and feloniously, to kill, contrary to the form of the statute,” etc.

This being held and considered as a charge of an assault and battery with intent to commit manslaughter, the court, being of the opinion, as we are informed by the prose-

53	354
140	301

53	354
156	448

The State v. Throckmorton.

cuting attorney, that there was no such crime known to the law, quashed this count of the indictment.

Of manslaughter there are two kinds, voluntary and involuntary. It may be conceded that there can be no such thing as an assault, or an assault and battery, with intent to commit manslaughter of the involuntary kind. But not so, we think, as to voluntary manslaughter. The statute defines manslaughter as follows:

"If any person shall unlawfully kill any human being without malice express or implied either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter," etc. 2 G. & H. 438, sec. 8.

The next following section is the one on which this indictment is founded. It reads as follows:

"Every person who shall perpetrate an assault, or an assault and battery, with intent to commit a felony, shall, upon conviction thereof, be imprisoned," etc.

We are aware that many eminent lawyers of this State are of the opinion that there can be no such thing as an assault, or an assault and battery, with intent to commit manslaughter. It is said by Judge BICKNELL, in his work on criminal law, that "there can be no indictment for an assault and battery with intent to commit the crime of manslaughter; because the peculiarity of manslaughter is, that it is free from unlawful intention to kill." Bicknell's Crim. Prac. 292.

It is a mistake to say that there can be no unlawful intention to kill in voluntary manslaughter. *Murphy v. The State*, 31 Ind. 511.

Mr. BISHOP, in his work on statutory crimes, sec. 508, expresses the opposite view to that taken by Judge BICKNELL, and thinks such view contrary to the actual course of things in the other states and "not sound as general American doctrine."

In New Hampshire, there was a statute providing, that "if any person shall make an assault upon another with an

The State v. Throckmorton.

intent to commit any crime described in this chapter, the punishment whereof shall be," etc., "he shall be punished," etc., and manslaughter was among the crimes described. It was held that this provision embraced, among the rest, an assault with intent to commit manslaughter. *The State v. Calligan*, 17 N. H. 253.

In *Murphy v. The State*, *supra*, the court, in speaking of the instructions given, said :

"By these instructions the jury were told, in effect, that there could be no purpose to kill in manslaughter, and that if such a purpose were shown to exist, the killing would be murder. This, we think, is not a correct exposition of the law. The killing may be unlawful, and purposely done, and yet if it is done without malice, in a sudden heat and transport of passion, caused by a sufficient provocation, it is only manslaughter. It was so held in *Dennison v. The State*, 13 Ind. 510," etc.

A reference to the case in 13 Ind. will show that the question was there so decided. The case of *Dennison v. The State* is cited and followed in *Hoss v. The State*, 18 Ind. 349, and *Long v. The State*, 46 Ind. 582.

But notwithstanding we are of the opinion that the second count in the indictment was good, we cannot reverse the judgment because the court held it bad. The first count charged the defendant with an assault and battery, with the intent, feloniously, purposely, and with premeditated malice, to kill and murder. Upon this count the prisoner was tried and acquitted. There is no doubt, we think, that the defendant, had the evidence warranted it, might have been found guilty, on the first count, of an assault and battery with intent to commit manslaughter. Bishop Stat. Crimes, sec. 503.

The State was not, therefore, injured by the ruling of the court in quashing the second count of the indictment. It will follow from this ruling, that a party indicted for an assault, or an assault and battery, with intent to commit murder in the first degree, may, if the evidence justify it,

Heaton *v.* Knowlton *et al.*, Administrators.

be convicted of the assault, or assault and battery, with intent to commit murder in the first or second degree or to commit manslaughter, or he may be acquitted of any felonious intent, and found guilty of the assault or assault and battery only.

It has been held that a party may be indicted of an assault, or an assault and battery, with intent to commit murder in the second degree. *The State v. Kesler*, 8 Blackf. 575. In such case, therefore, there may be a conviction, if the evidence warrant it, of the assault, or assault and battery, with intent to commit murder in the second degree, or to commit manslaughter, or, as in the other case, there may be an acquittal of any intent to commit a felony, and a conviction of the assault or assault and battery only.

If a party be indicted of an assault, or an assault and battery, with intent to commit manslaughter, he may, in a proper case, be convicted of the whole charge, or he may be acquitted of the intent to commit manslaughter, and found guilty of the misdemeanor only. These rules are deducible from sec. 72, p. 405, 2 G. & H., which provides, that, "upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto."

The judgment is affirmed.

HEATON *v.* KNOWLTON ET AL., ADMINISTRATORS.

FRAUD.—Rescission.—Consideration.—Where a promissory note has been procured by false and fraudulent representations, the party defrauded cannot rely on the fraud as a defence in an action on the note, if, as the consideration for the note, he received anything of value which he has not restored or offered to restore.

From the Shelby Circuit Court.

Heaton v. Knowlton *et al.*, Administrators.

J. S. Scobey and *O. B. Scobey*, for appellant.

K. M. Hord, *A. Blair* and *J. Harrison*, for appellees.

BUSKIRK, J.—The appellant, as assignee of Scobey and Donnell, sued Ephraim Knowlton before a justice of the peace, upon two promissory notes, which were executed for and in consideration of the right to use and vend, in Addison township, in Shelby county, Indiana, Hunt's patented machine for separating sugar from sorghum molasses.

The maker of the notes died, during the pendency of the action, and the appellees, his administrators, were substituted as defendants.

There have been three trials of the cause. The trial before the justice resulted in a verdict for appellees.

The appellant appealed to the circuit court, where another verdict was rendered against the appellant, whereupon the court granted a new trial. Upon a third and last trial, a similar verdict was rendered. Besides the above trials, where verdicts were rendered, the cause was submitted to a jury who failed to agree and were discharged.

The errors assigned call in question the correctness of the rulings of the court below in overruling motions for judgment upon the answers to interrogatories and for a new trial.

In answer to the first interrogatory, it was found that Knowlton, at the time of the execution of the notes, did not have a knowledge of the operation and capacity of the separator, by a trial or trials thereof in his presence; but in answer to the second, it was found that he had purchased the machine, and executed the notes, after he had witnessed trials of such machine. These findings can only be reconciled upon the theory that, although he had witnessed a trial of the machine, he did not understand its operation and capacity.

In answer to the third interrogatory, it was found that, at the time of the execution of the note, such machine would separate the sugar from granulated sorghum molasses.

In answer to the fourth, it was found that there had been

Heaton v. Knowlton *et al.*, Administrators.

no return or offer to return the patent, deed or assignment, but that the same were still held by Knowlton.

In answer to the fifth, it was found that the agent of Sco-bey and Donnell had falsely represented to Knowlton that he had sold a machine and township to a man who had realized one hundred and fifty dollars, and had the machine left.

In answer to the sixth, it was found that no payments had been made upon the notes.

It is contended by counsel for appellant, that the answers to the first, second and sixth interrogatories are unimportant; that fraud cannot be predicated upon the false representation found in answer to the fifth interrogatory; that the answers to the third and fourth interrogatories show that the machine and the right to use and vend the same, for which the notes were given, was a new and useful invention, and that Knowlton had not rescinded the contract, and hence, could not defeat a recovery upon the notes; and that consequently the appellant was entitled to a judgment upon the special findings of the facts by the jury in answer to the interrogatories submitted.

The conclusion at which we have arrived renders it unnecessary for us to decide whether the representation, found by the jury to have been made, amounted to such a fraud as would vitiate the contract. Conceding that the contract was procured by false and fraudulent representations, the party defrauded cannot rely upon such fraud, as a defence, unless he has rescinded the contract and offered to restore whatever of value he has received. A party cannot repudiate a contract on the ground of fraud, and at the same time retain the benefits derived from it, but must, when he discovers the fraud, restore or offer to restore to the other party what he has received, and failing to do this, he affirms the contract. When the consideration received is of any value to either party, its return must be tendered before the party can sustain an action for rescission of the contract or successfully defend an action based upon such contract. A party to a contract cannot treat it as good in part and void

The State v. Zimmerman *et al.*

in part, but he must affirm it or avoid it as a whole; nor can a contract, either for mistake or fraud, be rescinded in part and affirmed in part, but must be rescinded *in toto*, or not at all. *Shaw v. Barnhart*, 17 Ind. 183; *Shepherd v. Fisher*, 17 Ind. 229; *McGuire v. Callahan*, 19 Ind. 128; *Johnson v. Houghton*, 19 Ind. 359; *Love v. Oldham*, 22 Ind. 51; *Parks v. Evansville, etc., R. R. Co.* 23 Ind. 567; *Patten v. Stewart*, 24 Ind. 332; *Cain v. Guthrie*, 8 Blackf. 409; *Fisher v. Wilson*, 18 Ind. 133; *Stewart v. Ludwick*, 29 Ind. 230; *Johnson v. Cookerly*, 33 Ind. 151; *Joest v. Williams*, 42 Ind. 565; *DeFord v. Urbain*, 48 Ind. 219.

It was found by the jury, in substance, that the machine and the right to use and vend the same were of some value, and that there had been no return or offer to return the patent, deed or assignment, but the same were still retained by the maker of the notes. Under these circumstances, he was in no condition to make a defence to the notes. The special findings are in direct antagonism with the general verdict, and conclusively show that the appellees had no defence to the action. In such a case, judgment should have been rendered for the appellant upon the special verdict, notwithstanding the general verdict. *Buskirk Pr.* 211, 218.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to render judgment for the appellant upon the special findings, with interest from time of the trial.

THE STATE v. ZIMMERMAN ET AL.

CRIMINAL LAW.—*Disturbing Lawful Meeting.—Pleading.*—In a prosecution under the act of November 30th 1865 (3 Ind. Stat. 257), for molesting or disturbing a meeting other than those for the purposes specifically named in said act, the affidavit, information, or indictment should aver that it was a meeting for a lawful purpose; and an affidavit which

The State *v.* Zimmerman *et al.*

described the meeting as "a certain collection of divers inhabitants of the State of Indiana, met together as a singing-school," was bad on motion to quash.

From the Allen Criminal Circuit Court.

C. A. Buskirk, Attorney General, *S. M. Hench*, Prosecuting Attorney, and *R. D. Doyle*, for the State.

J. Q. Stratton and *R. Stratton*, for appellees.

DOWNEY, J.—The affidavit in this case charges, "that Samuel Zimmerman, Samuel Disler, Lewis Jacoby, Washington Shirley, John Shirley and Albert Bund did, on the 30th day of December, A. D. 1874, at the county of Allen, and State of Indiana, unlawfully interrupt, molest and disturb a certain collection of divers inhabitants of the State of Indiana, met together as a singing-school, by then and there unlawfully forcing their way into the house, against the rules of said singing-school, and making a noise by loud and unnecessary talking, contrary to the form of the statute," etc.

The prosecution was commenced before a justice of the peace, where the defendants were convicted. But, on appeal to the criminal court, the affidavit was quashed, and the question was properly reserved by the prosecuting attorney.

The prosecution was founded on the act approved November 30th, 1865, 3 Ind. Stat. 257. It provides, "that if any person shall * * * * by any loud and unnecessary talking or hollowing, or by any threatening, abusive, profane, or obscene language or violent actions, or by any other rude behavior, interrupt, molest or disturb such religious meeting or agricultural fair or exhibition, or any person present thereat, or going to or returning therefrom, or who shall in like manner molest or disturb any meeting of inhabitants of this State, met together for any lawful purpose, shall be fined," etc.

It will be observed that the statute provides specially for the cases of disturbing religious meetings and agricultural fairs or exhibitions. These assemblages are specially desig-

The State v. Zimmerman *et al.*

nated, and as to them there is no question as to their being lawful. But how is it as to singing-schools? Are the courts to take it for granted that singing-schools are meetings of inhabitants of this State for a lawful purpose?

It is urged by counsel for appellees, that to allege that the inhabitants were met for the purpose of holding a singing-school does not import that they were met for a lawful purpose, for, as they allege, a singing-school may be in many ways an unlawful meeting. It may, they urge, be riotous, indecent, and met for the purpose of singing bawdy songs, etc. Reference is made to *The State v. Oskins*, 28 Ind. 364. The information in that case would seem to have been liable to the objection urged against the affidavit in this case, and yet it was held good. The objection made to the affidavit in this case was not made to the information in that case. That case cannot, therefore, be regarded as an authority here. We have examined the question involved with some care, and while we do not intend any reflection on singing-schools, we have come to the conclusion that when the prosecution is for disturbing a meeting other than those for the purposes specifically named, the affidavit, information, or indictment should aver that it was a meeting for a lawful purpose. It is possible that a singing-school, with reference to the time or place or manner of holding and conducting the same, might not be a meeting for a lawful purpose. We think that rules of correct pleading require the omitted allegation. Whether the allegation of the particular character or purpose of the meeting could be omitted without rendering the pleading bad, we need not inquire, for the reason that the affidavit in this case contains such allegation.

The judgment is affirmed.

Maxwell v. Maxwell.

MAXWELL v. MAXWELL.

DIVORCE.—Evidence.—Residence of Petitioner.—On the trial of an action for a divorce, it is not necessary that there be formal and express proof of the residence of the petitioner required by the statute, or such proof that two witnesses testifying to such residence are resident householders and freeholders of the State; but it is sufficient, if, by the evidence in the cause, these facts be proved to the satisfaction of the court trying the cause.

From the Howard Circuit Court.

M. Garrigus, J. L. Farrar, J. W. Gordon, T. M. Browne and R. N. Lamb, for appellant.

N. R. Lindsay and Kerr & Conn, for appellee.

BUSKIRK, J.—This was a proceeding by the appellee against the appellant for a divorce. The appellant answered by a denial and cross complaint. There was issue, trial by the court, finding for appellee, motion for a new trial made and overruled, and judgment on the finding.

The overruling of the motion for a new trial is assigned for error, and presents for decision the only question in the record.

Four causes were assigned for a new trial, but the third is the only one discussed and relied upon by counsel for appellant, and that is as follows:

“3. The finding and decision of the court is not sustained by sufficient evidence, and is contrary to law, in this, that it was not proved in this cause by two or more resident householders and freeholders of the State of Indiana, or any other witnesses, that the plaintiff is now, or was at the time of the filing of her petition herein, a *bona fide* resident of the county of Howard, and State of Indiana; nor that the plaintiff is now, or was, a *bona fide* resident of the said county of Howard for the six months immediately preceding the filing of the complaint herein, nor at the time of the filing thereof; nor that said plaintiff was a *bona fide* resident of the State of Indiana at the time of filing her complaint herein, and for the two years previous to the said filing; nor that she is now

53	363
125	180
53	363
138	259

Maxwell v. Maxwell.

such resident; nor proof of any of the witnesses' being resident householders and freeholders of the State of Indiana."

By the seventh section of the divorce law of March 10th, 1873, Acts of Reg. Sess. 107, the plaintiff in a proceeding for divorce must file with his or her petition an affidavit, subscribed and sworn to by such petitioner, in which he or she shall state the length of time he or she has been a resident of the state; and stating particularly the place, town, city or township, in which he or she has resided for the last two years; and stating his occupation; which shall be sworn to before the clerk of the court in which said complaint is filed. The above requirement was fully complied with in the present action.

Upon the trial of such cause, the petitioner is required to prove to the satisfaction of the court, by at least two witnesses who are resident householders and freeholders of the State, the following facts:

1. That the petitioner was a *bona fide* resident of the county where the petition is filed at the time of the filing thereof.

2. That such petitioner had been such *bona fide* resident of such county for the six months immediately preceding the filing of such petition.

3. That such petitioner had been a *bona fide* resident of the State for at least two years previous to the filing of such petition. Such proof has to be made to the satisfaction of the court trying such cause. Upon the trial of the present case, there was no formal and express proof that two of the witnesses were resident householders and freeholders of the State, or of the residence of the petitioner as above required. But it is clearly proved by the evidence in the cause, that William Nation and Moses Craner, who were witnesses in the cause, were resident householders and freeholders of the State, and it was very clearly and satisfactorily proved by the said Nation and Craner that the petitioner had been continuously a *bona fide* resident of Jackson township, Howard county, Indiana, for twelve or thirteen years immediately

Dodge v. Gaylord et al.

preceding the filing of the petition, and that she was such resident at the time of the filing of the petition. The same facts are established by quite a number of other witnesses, who, however, are not shown to be resident householders and freeholders of the State. The evidence of Nation and Craner very clearly shows that the appellant and appellee settled in Jackson township, Howard county, Indiana, in the fall of 1863, and that they had resided therein down to the time of the trial. We think the evidence was sufficient to satisfy the court that the petitioner was a *bona fide* resident of the county and State.

We think the court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

DODGE v. GAYLORD ET AL.

SUPREME COURT.—Second Appeal.—If a cause be appealed to the Supreme Court, and by that court the judgment be reversed, and the cause be remanded to the court below for a new trial, and a second appeal be taken, it brings up for review and decision nothing but the proceedings subsequent to the reversal; none of the questions which were before the court and decided on the first appeal can be reheard or re-examined upon the second appeal.

SAME.—Second Trial on Same Facts.—Law of the Case.—The decision of the Supreme Court, rendered upon a given state of facts, becomes the law of the case as applicable to such facts; and if the cause be remanded for a new trial, the parties have the right to introduce new evidence and establish a new state of facts; and when this is done, said decision ceases to be the law of the case, and the court, in the trial of such case, is not conclusively bound by such decision, but should apply the law applicable to the new and changed state of facts; but if such cause be submitted to the court or jury for a re-trial upon the same identical facts on which said decision was rendered, such decision remains the law of the case, and the trial court must apply the law as laid down by the appellate court to the facts so submitted to the court or jury.

53	365
130	17
53	365
133	510
53	365
134	273
184	622
186	388
53	365
137	211
53	365
146	313
53	365
164	371
53	365
165	359
53	365
170	259
170	260

Dodge v. Gaylord et al.

INSTRUCTION TO JURY.—*Directing Verdict.*—Where, upon the trial of an action by a jury, there is no evidence submitted to the jury which shows a cause of action in the plaintiff, it is the duty of the court to direct the jury to find for the defendant.

From the Tippecanoe Circuit Court.

Z. Baird, W. C. Wilson and J. A. Stein, for appellant.

R. Jones, S. A. Huff, B. W. Langdon and R. P. Ranney, for appellees.

BUSKIRK, J.—In this case there was a former trial, in which there was a verdict and judgment in favor of the appellant, from which an appeal was prosecuted by the appellees, and the judgment was reversed by this court, and the cause was remanded for another trial. The judgment was reversed upon the evidence then in the record, upon the ground that upon the facts proved the appellant was not entitled to recover. The case is reported in 31 Ind. 41, as *Gaylord et al. v. Dodge*, to which reference is made for a statement of the facts and questions involved and decided.

The case was again tried in the court below, by a jury, upon the same issues, and upon the evidence as embodied in the bill of exceptions in the record upon the former appeal, no other or different evidence being introduced upon the second trial. Both of the bills of exceptions are in the present record, and upon a comparison of them it is made to appear that the evidence given upon the last trial is identically the same as that given upon the first trial.

It is very earnestly contended by counsel for appellees, that no question is presented by the record, for decision, for the reason that every question of law arising in the present record was involved, considered and decided by this court, when the case was formerly here; and that, as it is the same case, between the same parties, upon the same issues, and supported by the same evidence, the principles of law announced by this court upon the former hearing have become the law of the case, and that this court is conclusively bound to apply to the case, in all of its stages, the principles then decided.

Dodge v. Gaylord et al.

It is quite obvious that if, when this cause was remanded for another trial, the issues had been changed, and new and additional evidence had been introduced upon the second trial, the principles of law formerly decided would have ceased to be the law of the case, and we would now be required to declare the law applicable to the new state of facts. It is equally plain that if any error was committed by the court upon the second trial, other than in applying to the same facts the principles of law formerly decided in this case, it will be reviewable upon the present appeal, and for such error the judgment may be reversed. But it is not pretended that such is the case. This court held and decided that, upon the facts in the record, the appellant had no right of action, and remanded the cause for another trial. If the facts had been agreed upon or found specially by the court or jury, this court would doubtlessly have remanded the cause with directions to the court below to render judgment for the appellees, but, such not being the case, the court could only remand the cause for a new trial. *Buskirk Prac.* 334.

Upon the second trial, the appellant had the clear and undoubted right to establish a different state of facts, and had this been done, the question under examination could not have arisen. The question is, therefore, squarely presented, whether the appellant can in this manner obtain a review and reversal of the former judgment of this court. As has been seen, the only question involved and decided upon the former appeal was, whether, upon the facts proved, the appellant was entitled to one-third of the real estate described in the complaint; and this court held she was not, reversed the judgment, and remanded the cause "for a new trial and for further proceedings in accordance with this opinion." The cause was submitted to the jury on the second trial upon identically the same facts, and the court instructed the jury that, "under the evidence produced on the trial of this cause, you must find for the defendant;" and the jury so found. It was the solemn and imperative duty of

Dodge v. Gaylord et al.

the court below to carry out in good faith the decision and instructions of this court. *Julian v. Beal*, 34 Ind. 371; *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Skillern's Ex'rs v. May's Ex'rs*, 6 Cranch, 267; *Ex parte Story*, 12 Pet. 339; *Ex parte Dubuque & Pacific R. R.*, 1 Wal. 69; *Milwaukie, etc., R. R. Co. v. Soutter*, 2 Wal. 510.

This court had decided upon the facts that the appellant had no cause of action, and had commanded the court below to try the cause in accordance with the opinion then announced. The court below had no power to do anything but to say to the jury that, in accordance with the decision of the Supreme Court, you must, upon the facts, find for the defendants. If the court below had instructed the jury otherwise than it did, it would have disobeyed the mandate of this court and set at defiance the principles of law laid down by this court. The court below could not commit an error in simply carrying out the mandate of this court. The appellant might with as much propriety assign for error on the present appeal, that this court had erred in the opinion announced and judgment rendered upon the first appeal, as to ask us to reverse the judgment upon the ground that the court below had erred in carrying out the mandate of this court. This is, in effect, an appeal from the decision rendered by this court, as constituted when the first decision was rendered, to the court as at present constituted.

We think the following propositions of law are settled by the adjudged cases:

1. When the rights of parties have been decided by a court of last resort, the decision so rendered becomes the law of the case, and if the same question should arise between the same parties, or those claiming under them, in a subsequent action, the decision first rendered is conclusively binding upon the court, though it should doubt the correctness of such decision; for it possesses no power to reverse the former decision. The doctrine of the law of the case is only applicable to the parties or their privies, upon the same cause of action.

Dodge v. Gaylord *et al.*

2. So it is settled, that if a cause be appealed to the Supreme Court, and the judgment be reversed, and the cause remanded to the court below for a new trial, and a second appeal be taken, it brings up for review and decision nothing but the proceedings subsequent to the reversal; none of the questions which were before the court and decided on the first appeal can be reheard or re-examined upon the second appeal.

3. It is also settled, that the decision of the Supreme Court, rendered upon a given state of facts, becomes the law of the case as applicable to such facts, and if the cause be remanded for a new trial, the parties have the right to introduce new evidence and establish a new state of facts; and when this is done, the decision of the Supreme Court ceases to be the law of the case, and the court in the trial of such case is not conclusively bound by such decision, but should apply the law applicable to the new and changed state of facts; but if such cause be submitted to the court or jury for a re-trial upon the same identical facts upon which the decision was rendered, such decision remains the law of the case, and the trial court must apply the law as laid down by the appellate court to the facts submitted to the court or jury.

The question has frequently arisen and been decided by the Supreme Court of the United States. *Himely v. Rose*, 5 Cranch, 313; *Martin v. Hunter's Lessee*, 1 Wheat. 304; *The Santa Maria*, 10 Wheat. 431; *Browder v. M'Arthur*, 7 Wheat. 58; *American Ins. Co. v. Canter*, 1 Pet. 511; *Ex parte Sibbald v. The United States*, 12 Pet. 488; *The Bank, etc., v. Beverly*, 1 How. U. S. 134; *Washington Bridge Co. v. Stewart*, 3 How. U. S. 413; *Corning v. Troy, etc., Factory*, 15 How. U. S. 451; *Sizer v. Many*, 16 How. U. S. 98; *Roberts v. Cooper*, 20 How. U. S. 467.

In *Corning v. Troy, etc., Factory, supra*, the court say:

"It is plain, therefore, that, under the guise of an appeal from the decree of the Circuit Court, this is an appeal, in

Dodge v. Gaylord *et al.*

fact, from the decision of this court. For there is no other decree existing in the case except the decree of this court. There must be an end of litigation sometime. To allow a second appeal to a court of last resort, on the same questions which were open to dispute on the first, would lead to endless litigation." Again: "A second appeal lies only when the court below, in carrying out the mandate of this court, is alleged to have committed an error. But, on an appeal from the mandate, it is well settled, that nothing is before the court but the proceedings subsequent to the mandate. Whatever was formerly before the court, and was disposed of by its decree, is considered as finally disposed of."

In *Sizer v. Many*, *supra*, TANEY, C. J., on page 103, says:

"It has been settled, by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or re-examined upon the second."

In *Roberts v. Cooper*, *supra*, the court say:

"On a writ of error to this court, the judgment of the court below was reversed, and the record remitted for further proceedings, in pursuance of the judgment of this court. The report of the case in 18 Howard, 173, exhibits a full statement of the facts, and of the questions of law arising thereon, as decided by the court, which it is unnecessary to recapitulate. On the last trial, the circuit court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a

Dodge v. Gaylord *et al.*

second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members."

The question has been under examination in many cases in the State of Maryland, and the principles hereinbefore announced have been fully endorsed. In *Cumberland Coal and Iron Co. v. Sherman*, 20 Md. 117, the court, on page 130, say :

"The most prominent and material features of this case have been elaborately argued and deliberately considered in the decision of the case of *The Hoffman Steam Coal Company of Allegany County v. The Cumberland Coal & Iron Company*, tried before this court at June term, 1860. A synopsis of the pleadings and points then presented, and the opinions of the court, will be found in 16 Md. 456. The parties are the same, but their position is now reversed. The former appeal was taken by the present appellees from the order of the judge of the Circuit Court for Allegany County, passed after answers filed and testimony taken by the parties, under the act of 1835, refusing to dissolve and continuing the injunction before granted by him. This court affirmed the orders of the court below, and continued the injunction until final hearing.

"The cause being remanded for further proceedings, commissions were issued, further testimony taken, and, on final hearing, the same learned judge who granted and continued the injunction dissolved the same and dismissed the bill. From which decree the present appeal is taken.

Dodge v. Gaylord *et al.*

“The cause being heard originally on testimony taken under the act of 1835, a large proportion of the evidence now in the record has already been reviewed and considered by our predecessors. It devolves upon us to determine how far the former testimony has been qualified by the latter, whether there is such a material change in the aspect of the case, as to oblige us to depart from the decision previously pronounced.

“The law, as applied to the facts there developed, is expounded with great force in the opinion of our late brother, the Chief Justice. Much of the labor which the magnitude of the interests and record seemed to impose has already been performed; our duty being to observe that cardinal maxim of justice and jurisprudence, that the court should adhere to its own decisions in the same cause and between the same parties.

“Where, upon appeal, the appellate court decides a question presented by the record, and the cause is remanded, the decision is binding both upon the court below and the appellate court, and cannot be reversed upon a second appeal.’ *Emory & Garret v. Owings et al.*, 3 Md. Rep. 178; *Preston v. Leighton*, 6 Md. Rep. 88; *Hammond’s Lessee v. Inloes*, 4 Md. Rep. 138; *Eyler & Matthews v. Hoover, Ex’r of Crabbs*, 8 Md. Rep. 1; *Mong v. Bell*, 7 Gill, 246; *Brown v. Sumerville*, 8 Md. Rep. 444.”

The question under examination has been passed upon several times in the State of California, where the principles hereinbefore stated were fully approved. *Dewey v. Gray*, 2 Cal. 374; *Clary v. Hoagland*, 6 Cal. 685; *Gunter v. Laffan*, 7 Cal. 588; *Soule v. Ritter*, 20 Cal. 522; *Leese v. Clark*, 20 Cal. 387; *Phelan v. San Francisco*, 20 Cal. 39; *Trinity County v. McCammon*, 25 Cal. 117; *Lucas v. San Francisco*, 28 Cal. 591; *Mitchell v. Davis*, 23 Cal. 381; *Estate of Pacheco*, 29 Cal. 224.

In *Clary v. Hoagland*, *supra*, it is said: “It is well settled, that when a case has been once taken to an appellate court, and its judgment obtained on points of law involved,

Dodge v. Gaylord *et al.*

such judgment, however erroneous, becomes the law of the case, and cannot on a second appeal be altered or changed."

In *Mitchell v. Davis, supra*, the court say: "It is urged that the previous decision upon this point has become the law of the case, and conclusive upon the parties; and numerous decisions of this court are referred to. An examination of those cases will show, however, that they apply only to principles of law announced in a case, and not to mere questions of fact which may have been passed upon. For instance, it was held in this case, on the previous appeal, as a question of fact, that the evidence showed that the possession of the plaintiff was as the agent of Storer, and not by any right in himself; and it was further held as a principle of law, founded upon this fact, that the possession of the agent was the possession of his principal for the purpose of this action, and therefore the action should have been in the name of the principal. The determination of this principle has become the law of the case; but the question of fact, whether or not the plaintiff was the agent of Storer, is liable to be changed by further evidence showing the true and a different state of facts; and the action of this court upon this question of fact does not operate as a bar or estoppel upon the plaintiff from showing the true facts of the case. If no further evidence had been introduced by the plaintiff on the second trial upon this point, there might have been some grounds for saying that the question had been put at rest by the former adjudication. The judgment of this court was, that the case be remanded for a new trial; at which new trial the plaintiff had a clear right to introduce any evidence relevant to the issues to be tried."

The question under examination has received very careful and elaborate consideration by the Supreme Court of Wisconsin, in a large number of cases, and the ruling has been firm and uniform, and has been to the effect that the decision of the Supreme Court, though erroneous, was conclusively binding upon the parties and the court upon a second appeal; that while the doctrine of such case might be reconsidered

Dodge v. Gaylord et al.

and overruled in another case, it could not be varied or departed from in the same case. *Parker v. Pomeroy*, 2 Wis. 112; *Downer v. Cross*, 2 Wis. 371; *Cole v. Clarke*, 3 Wis. 323; *Ryan v. Martin*, 18 Wis. 672; *Pierce v. Kneeland*, 9 Wis. 23; *Reed v. Jones*, 15 Wis. 40; *Akerly v. Vilas*, 24 Wis. 165; *Wright v. Sperry*, 25 Wis. 617; *Noonan v. Orton*, 27 Wis. 300; *McLeod v. Bertschy*, 34 Wis. 244; *DuPont v. Davis*, 35 Wis. 631.

The same doctrine has been maintained in Massachusetts. *Adams v. Pearson*, 7 Pick. 341; *Booth v. Commonwealth*, 7 Met. 285.

In the last case, Mr. Chief Justice SHAW, speaking for the court, says:

“In this case, the court are of opinion that the writ of error must be quashed. It appears a former writ of error was brought on this same judgment, and upon the plea of *in nullo est erratum* the judgment was affirmed. On such a plea, any error apparent on the record may be assigned, and the entire validity and legal correctness of the judgment are open, and of course were decided. Upon the principle of *res judicata*, the plaintiff in error is now estopped from denying that the supposed error, now insisted on, was not considered and adjudged against him by the affirmance of the judgment.

“Authorities have been cited to show that a second writ of error has been maintained, where the former decision did not embrace the whole merits of the case. *Hopkins v. Commonwealth*, 3 Met. 460; *Wilde v. Commonwealth*, 2 Met. 408. No doubt, where the error arises from matter subsequent to the former decision, and which did not then exist, a new writ of error may be brought, and such new matter be assigned for error. Such was the case of *Hopkins v. Commonwealth*.”

There are three cases in the State of Kentucky holding in accordance with the cases previously cited. *Craig v. Bagby*, 1 T. B. Mon. 148; *Tribble v. Frame*, 3 T. B. Mon. 51; *Moss v. Rowland*, 3 Bush, 505.

Dodge v. Gaylord et al.

We find two cases in Pennsylvania holding the same doctrine. *Groff v. Groff*, 14 S. & R. 181; *Gratz v. Lancaster Bank*, 17 S. & R. 278.

The same doctrine has been uniformly held in New York. *Simpson v. Hart*, 1 Johns. Ch. 91; *Gelston v. Codwise*, 1 Johns. Ch. 195; *Perine v. Dunn*, 4 Johns. Ch. 140; *Wilcox v. Hawley*, 31 N. Y. 648.

It has been so held in Connecticut. *Goodrich v. Thompson*, 4 Day, 215; *Nichols v. Bridgeport*, 27 Conn. 459.

In Missouri the same principle has been announced in a well considered case. *Chambers' Adm'r v. Smith's Adm'r*, 30 Mo. 156.

There are three well considered cases in Alabama maintaining the same doctrine. *Jesse v. Cater*, 28 Ala. 475; *Maulden v. Armistead*, 30 Ala. 480; *Goodman v. Walker*, 30 Ala. 482.

In *Hollowbush v. McConnel*, 12 Ill. 203, the court say:

“Both these questions were substantially settled when the case was here before. The first one was the very point then decided, and the court has now no power, if it had the inclination, to reverse that decision. There is no mode provided, by law, except it be upon a rehearing, whereby the final decision of a case in this court can be reversed or set aside at a subsequent term.

“There must be an end of litigation somewhere, and there would be none if parties were at liberty, after a case had received the final determination of the court of last resort, to litigate the same matter anew, and bring it again and again before the court for its decision. *Washington Bridge v. Stewart*, 3 Howard, 413; *Booth v. Commonwealth*, 7 Met. 285.”

In *Kingsbury v. Buckner*, reported in the Chicago Legal News of June 7th, 1873, the Supreme Court of Illinois say:

“Upon the former hearing, after full argument, this court decided that Henry W. Kingsbury held the property conveyed by the deed from Mrs. Buckner and her husband to him as trustee. * * * * The cause was remanded to

Dodge v. Gaylord *et al.*

ascertain her share, and not to determine the trust. The latter had been established by the declaration of this court. This appeal is prosecuted from the decree making partition, and can bring before us no other question except questions incident to the order of partition. We cannot examine as to the merits of the original case, but only as to proceedings subsequent to the decision on the former hearing. * * * This is the doctrine of the courts, as definitely settled by repeated decisions."

The law is firmly settled in this State in accordance with the general current of the adjudged cases hereinbefore cited. The great length of this opinion renders a review of them improper. We content ourselves with citing them.

Hobson v. Doe, 4 Blackf. 487; *Cox v. Pruitt*, 25 Ind. 90; *Welch v. Bennett*, 39 Ind. 136; *Hamrick v. The Danville, etc., Co.*, 41 Ind. 170; *Hawley v. Smith*, 45 Ind. 183.

We have found no cases holding the opposite doctrine.

Counsel for appellant, in his brief, says:

"We have already seen that, on a second appeal or writ of error, the court of last resort will only consider the propriety of the proceedings and judgment of the court below occurring after its decision on the first appeal. In this case the principal cause of error, the imperative instruction of the jury to find for the defendant, was not before this court on the first appeal."

In our judgment, the concession contained in the foregoing extract is fatal to the appellant, for if we can only consider upon this appeal the propriety of the proceedings and judgment of the court below occurring after our decision on the first appeal, there is nothing for us to decide. The court below simply carried out the mandate of this court. In the first decision rendered by this court, it was laid down as law, that upon the facts in the record the appellant was not entitled to recover. The cause was again submitted to the jury upon the same identical facts. This is expressly admitted by the learned counsel for appellant. As the facts

Dodge v. Gaylord *et al.*

remained the same, the law applicable to such facts remained the same.

It only remains to inquire whether the court below erred in directing the jury to find for the defendants. In *Cutler v. Hurlbut*, 29 Wis. 152, the right of the court to direct the jury to find for the defendants was involved and very fully considered. There the court refused certain written requests to charge, asked by the plaintiff, and then directed the jury to return a verdict for the defendant. In speaking of such direction, the court say:

“The court below, refusing all requests to instruct or to submit anything to the jury, on the part of the plaintiff, peremptorily directed them to return a verdict for the defendants. If the court had this power at all, or if it was admissible or competent under any circumstances so to direct a verdict, then it is obvious that the verdict so returned must stand until the defeated party shows that there was error or some mistake of law or of fact in the direction. The practice of thus directing verdicts, especially in actions of this nature, which is ejectment, is familiar to the profession in this State. It is a thing which has been often done in our courts, and an examination of the books will show that it is a practice, the correctness of which is well settled and recognized in the courts elsewhere. It seems at one time to have been considered a matter of some doubt whether the courts could direct a non-suit after evidence given in behalf of the defendant, but it is now well settled that this can be done. *Davis v. Hardy*, 6 Barn. & Cress. 225; *Fort v. Collins*, 21 Wend. 109; *Jansen v. Acker*, 23 Wend. 480; *Rudd v. Davis*, 3 Hill, 387. In the last named case the court observed:

“‘It is said, that to warrant a non-suit on his own evidence, after a plaintiff has made out a *prima facie* case, the evidence must be conclusive in its character—a record, for instance, or something amounting to absolute verity, so as to present a mere question of law. We do not understand this to be the rule. It is enough that a verdict for the

Dodge v. Gaylord *et al.*

plaintiff would be against the clear weight and effect of the defensive evidence, whatever may be its character.' But the practice, which is similar in its nature, of directing a verdict in proper cases, when the evidence is all in, in favor of the party who may be entitled to it, seems never to have been questioned. *Saville v. Lord Farnham*, 2 Mann. & Ryl. 216; *Nichols v. Goldsmith*, 7 Wend. 160; *Dryden v. Britton*, 19 Wis. 22; *Grand Trunk Railway Co. v. Nichol*, 18 Mich. 170; *Hynds v. Hays*, 25 Ind. 31; *Callahan v. Warne*, 40 Mo. 131; *Singleton v. Pacific Railroad*, 41 Mo. 465; *Smith v. Hann. & St. J. R. R. Co.*, 37 Mo. 287; *Stephens v. Brooks*, 2 Bush, 137. And I find it stated in a work of respectable authority (3 Gra. & Wat. on New Trials, 1214, note 2), that in the English courts the judge is constantly in the habit of directing a verdict of the jury, which is taken and entered by the clerk as a matter of course; unless the jury object. And in *Davis v. Russell*, 5 Bing. 354, GASELEE, J., said: 'I was requested to non-suit the plaintiff. I could not do so upon the plaintiff's case, though in similar cases, I have occasionally done so, after hearing the defendant's case; but when there is any doubt as to the facts, they must be found by the jury.' See, also, the remarks of MARCY, J., in *Demger v. Sanger*, 6 Wend. 438, and the case of *Dunham v. Baxter*, 4 Mass. 79.

"It being thus established that it is competent, and that the court may in a proper case rightfully thus direct a verdict, it seems to follow as a matter of course that such verdict cannot be set aside, or the judgment reversed on error, unless the plaintiff in error or appellant is prepared to show and does show by the record that such direction was wrong, or that the case was not a proper one for the court so to direct the jury. If, in any case, it be competent or proper for the court to give the direction, then the presumption must be that the direction was correctly given, or that there was no error on the part of the court in giving it in the particular case, until the contrary be shown. The instances of

Dodge v. Gaylord *et al.*

the application of the maxim, *omnia præsumentur rite acta*, to questions of this kind are numberless in the books, and no one would attempt to collect or cite them. It is a maxim which governs as to all judicial proceedings and records in courts of general jurisdiction, and, as remarked by the court in *Peebles v. Rand*, 43 N. H. 340, 'It can never be enough to show that there *may be* an error in their proceedings. The party who brings a writ of error is bound to show that it *exists* by proper averments.'"

In *Hynds v. Hays*, 25 Ind. 31, the rule is stated thus:

"The court also instructed the jury that there was no evidence before them that the consideration of that bill was unlawful currency. This instruction was proper to be given, if no such evidence had been admitted. Where there is no evidence, whatever, to maintain an issue, it is the duty of the court so to inform the jury. This is not usurping the province of the jury."

To the same effect are the following cases:

The Governor v. Shelby, 2 Blackf. 26; *Nixon v. Brown*, 4 Blackf. 157; *Crookshank v. Kellogg*, 8 Blackf. 256; *State Bank v. Hayes*, 3 Ind. 400; *The Lawrenceburgh, etc., Co. v. Montgomery*, 7 Ind. 474; *Bray v. Pearsoll*, 12 Ind. 334; *Devol v. Halstead*, 16 Ind. 287; *Porter v. Millard*, 18 Ind. 502; *Steinmetz v. Wingate*, 42 Ind. 574.

According to the principles of law declared by this court in the first appeal in this case, there was no evidence submitted to the jury upon the second trial which showed any cause of action in the plaintiff. It was, therefore, the duty of the court below to direct the jury to find for the defendants.

There was no error committed by the court below.

The judgment is affirmed, with costs.

The Franklin Life Insurance Co. v. Sefton, Adm'r, *et al.*

53	880
150	646
150	647
150	648
150	649

THE FRANKLIN LIFE INSURANCE CO. v. SEFTON, ADM'R,
ET AL.

INSURANCE.—*Life Insurance.—Assignment of Policy.*—During the lifetime of a person who has a policy of insurance on his own life, payable after his death to his personal representative, another person, who has no insurable interest in the life of the insured, cannot purchase said policy and take an assignment of it to himself from the insured, and hold the title thereof in himself for his own benefit.

SAME.—*Pleading.—Conclusion of Law.*—Action by an administrator upon a policy of insurance on the life of his decedent. Answer by the insurance company, showing that the insured, in his lifetime, assigned the policy to another person, and that the company indorsed upon the assignment its consent thereto. Reply, that the assignee had not any insurable interest in the life of the insured.

Held, that the reply averred a conclusion of law, and not matter of fact, and was therefore bad on demurrer.

SAME.—*Forfeiture for Non-payment of Premium.—Evidence.—Statements of Agent.*—A policy of life insurance, by the terms of which renewal premiums were to be paid by the insured annually on a certain day, stipulated that, "in case the first renewal premium shall not be paid at the time it becomes due, then this policy shall be absolutely forfeited;" and upon the policy was indorsed, "Agents of this company will receive premiums when due, but are not authorized in any case to make, alter or discharge contracts." The first renewal premium was not paid until fifteen days after it became due, when it was paid to a person acting as agent of the company. The insured died afterwards, during the second year. On the trial of an action on said policy, brought by the administrator of the estate of the insured, certain letters written by the secretary of said company to the widow of the insured, admitting the liability of the company on the policy, were admitted in evidence on behalf of the plaintiff, over the objection of the company, it not being shown that the secretary had authority to adjust losses, or that he was authorized by the company to write the letters, or that his act in writing them was ratified by the company.

Held, that the letters were not competent evidence.

SAME.—*Evidence.—Custom.*—On the trial of such action, the fact that it was the custom or usage of said company to receive payments of premiums after they were due, was not admissible in evidence on behalf of the plaintiff, to control the terms of the policy, or as affording an inference that in the case in question the premium was received by the company after it was due and that the forfeiture was thereby waived.

SAME.—*Agent.—Ratification.*—Under such a policy, the acceptance of a renewal premium by an agent of the company after it became due could not bind the company, without its ratification of the act.

The Franklin Life Insurance Co. v. Sefton, Adm'r, *et al.*

From the Marion Civil Circuit Court.

J. S. Tarkington, for appellant.

G. H. Chapman, U. J. Hammond, J. J. Hawes, W. Morrow, N. Trusler and *F. Hiner*, for appellees.

WORDEN, C. J.—This was an action by the appellee William H. Sefton, as the administrator of the estate of William S. Cone, deceased, against the appellant, upon a policy of insurance issued by the appellant to said Cone, binding the appellant, for the consideration therein named, to pay to the executors or administrators of Cone, after his death, the sum of three thousand dollars, upon the terms and conditions therein specified. Hazzard and Manly were made defendants upon the allegation that they each had, or claimed to have, some interest in the policy adverse to the plaintiff, and that they were necessary parties to a complete determination of the questions involved. Manly filed a disclaimer, and as to him no question is here presented. The appellant answered, and issue was joined. Hazzard answered by way of counter claim, setting up an assignment of the policy to himself by Cone, in his lifetime, and claiming judgment for the amount thereof against the company. The issues were tried by a jury, who found for the plaintiff, Sefton, against the defendants, and there was judgment in favor of the plaintiff against the company for the amount due on the policy.

Hazzard has assigned cross errors, which we will consider first.

The cross errors raise but one question, viz.: whether Hazzard could purchase the policy from Cone and take an assignment thereof from Cone to himself, for his own benefit, so as to vest the title in himself, he not having any insurable interest in the life of Cone. This question was before us in the case of *The Franklin Life Insurance Co. v. Hazzard*, 41 Ind. 116, in which we decided that he could not thus take and hold the policy by assignment. We have seen nothing, since that decision was pronounced, that shakes

The Franklin Life Insurance Co. v. Sefton, Adm'r, *et al.*

our confidence in the correctness of the conclusion then arrived at; but subsequent reflection has rather confirmed us in the conviction that the case was correctly decided. We do not care to add anything to what was said in that case, upon the main question. We might say, however, that after the death of the insured, there would seem to be no reason why the policy might not be transferred, by those having the right to make the transfer, to any one who might choose to purchase. Doubtless, also, a person may take a policy upon his own life, and, by the terms of the policy, appoint a person to receive the money in case of his death during the existence of the policy, as was the case in *The Provident Life Insurance, etc., Co. v. Baum*, 29 Ind. 236. As was said in that case, "It cannot be questioned that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money in case of his death during the existence of such policy. It is not for the insurance company, after executing such a contract, and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be any controversy as to the distribution among the heirs of the deceased, of the sum contracted to be paid, that does not concern the insurers."

This is all in entire harmony with the proposition that a party cannot take by assignment from the insured, and hold for his own benefit, a policy on the life of one in whose life he has no insurable interest.

The counsel for Hazzard claim that the case of *Hutson, Adm'r, v. Merrifield, Adm'r*, 51 Ind. 24, is in conflict with that of *The Franklin Life Insurance Co. v. Hazzard, supra*. It was not intended by the former to overrule the latter case, nor do we think the two cases are in conflict. In the former case, Mrs. Bingham had taken out a policy of insurance upon the life of her husband. She died before her husband, and the point decided was, that upon her death, her right and interest in the policy went to her heirs under the statute of distributions, and that upon her husband's death

her administrator became entitled to the money. The transfer by operation of law, upon the death of the holder of the policy, of the right of the policy, is an entirely different thing from a transfer by purchase and assignment during the life of the holder. The court said in that case, to be sure, that "the party holding and owning such a policy, whether on the life of another or on his own life, has a valuable interest in it, which he may assign, either absolutely or by way of security, and it is assignable like any other chose in action."

Such policy is, doubtless, assignable, and assignable like any other chose in action; but it is not stated in the opinion, nor does it necessarily follow from what is stated, that it is assignable to a person incapable, by reason of public policy, of receiving the assignment. It may be added that where the policy holder dies before the death of the party whose life is insured, perhaps the administrator of the holder could, for the purpose of converting the assets into money and settling up the estate in due course of law, sell the policy to any one who might choose to become the purchaser.

There is no error in the record of which Hazzard can complain.

We proceed to the consideration of the errors assigned by the appellant.

The first is, that the complaint does not state facts sufficient to constitute a cause of action.

No point is made upon this assignment in the brief of counsel for the appellant, and we discover no defect in the complaint.

Second. That the court erred in overruling the appellant's demurrer to the second paragraph of the reply to the fourth paragraph of the answer.

By the fourth paragraph of its answer, the company alleged that the policy had been assigned by Cone in his lifetime to Hazzard, and that the assignment had been consented to by the company, setting out a copy of the assignment and the consent of the company endorsed thereon.

The Franklin Life Insurance Co. v. Sefton, Adm'r, *et al.*

The reply admits the assignment and the consent of the company, as alleged, but avers that said Wilbur F. Hazzard did not, when said assignment was executed, have, and has not now, and never has had, any insurable interest whatever in the life of said William S. Cone, and that said assignment was and is wholly void in law. It is objected that the replication is bad, as averring a conclusion of law, and not matter of fact.

This objection would seem to be well taken. Whether Hazzard had any *insurable* interest in the life of Cone depended upon facts which are not stated. Whether he had any such interest depended upon the law as applied to the facts; but no facts are alleged from which such conclusion is drawn. Had the pleading alleged that Hazzard had no interest in the life of Cone, it would probably have been sufficient. But the allegation is that he had no insurable interest. The pleading is pregnant with an affirmative, viz.: that Hazzard had an interest in the life of Cone, but alleges that it was not an insurable one. This must be a conclusion of law drawn from matter not stated. But we doubt whether the judgment should be reversed because the replication was erroneously held good on demurrer, inasmuch as the whole record shows that the appellant was in no manner injured by the ruling. We have seen that Hazzard filed his counter claim in the cause, setting up, against the plaintiff, his claim to the policy, and against the company, his supposed right to recover the amount thereof, and that the issues formed thereon were found against him. The judgment, it seems to us, precludes Hazzard from bringing another action against the company on the policy. But we pass this point, inasmuch as we have concluded that the judgment will have to be reversed on other grounds, and when the cause goes back, the parties, if they desire it, can probably obtain leave to amend their pleadings.

Third. The court erred in overruling the appellant's motion to strike out the second paragraph of the reply to the fourth paragraph of the answer.

The Franklin Life Insurance Co. v. Sefton, Adm'r, *et al.*

We see no error in this ruling. A motion to strike out a pleading is not the proper mode of testing its sufficiency.

Fourth. The court erred in overruling the motion of the appellant to set aside the rule to answer the counter claim of Hazzard. It is claimed by the appellant that it could not be compelled to answer the counter claim of Hazzard, without being summoned to appear to it, it being substantially a new action by him. We do not think any summons was necessary. *Pattison v. Vaughan*, 40 Ind. 253. If it was, it did not concern the plaintiff, and any error committed in this respect, in favor of Hazzard against the company, could not affect the action of the plaintiff against the company.

Fifth. The court erred in overruling the motion of the appellant to strike out the second paragraph of the reply to the second paragraph of the answer of the company.

We see no reason for striking out the paragraph of reply mentioned.

Sixth. The court erred in overruling the appellant's motion for a new trial.

This assignment raises the important questions in the cause, as between the original plaintiff and the company.

The policy sued on bears date September 2d, 1867, and recites the payment of a premium, on that day, of the sum of sixty-two dollars and forty cents, and by its terms a like premium was to be paid by the insured on the second day of September in every year thereafter, during the life of Cone, to be paid by the hour of twelve o'clock, M., on said days. It contains the following stipulation:

"In case the first renewal premium shall not be paid at the time it becomes due, then this policy shall be absolutely forfeited."

Upon the policy was endorsed the following memorandum, viz.:

"Agents of this company will receive premiums when

The Franklin Life Insurance Co. *v.* Sefton, Adm'r, *et al.*

due, but are not authorized in any case to make, alter or discharge contracts."

The first renewal premium, that due September 2d, 1868, was not paid before the 17th of that month, when it seems to have been paid to Edward Manly, who was acting as agent for the appellant.

Cone died in July, 1869.

On the trial of the cause, the plaintiff offered and gave in evidence the following letters from the secretary of the company, to the widow of the insured, viz.:

"INDIANAPOLIS, October 30th, 1869.

"Mrs. William S. Cone, Laurel, Indiana:

"Dear Madam, The directors desire to know, before paying the loss upon the life of your late husband, the terms of the arrangement between yourself and Mr. Hazzard. The idea of life insurance is to make provision for widows and orphans, and they feel it their duty, before paying the loss, to know how much you are to receive, as they are anxious to see that you are properly protected. Please state, also, the amount which your husband owed Mr. Hazzard. The desire of the directors is to see that you get your rights, and you will please answer this at your earliest convenience, not mentioning anything about this letter to any one.

"Very truly yours,

E. P. HOWE, Sec'y."

"INDIANAPOLIS, November 10th, 1869.

"Mrs. William S. Cone, Harrison, Ohio:

"Dear Madam, Your letter of the 3d came to hand in due time, and was very clear and satisfactory. We thought there was something suspicious in the case, and perhaps you were" (not?) "getting your rights. I think there is no question about your being entitled to the whole amount of the policy, less what you owe Hazzard and the amount he paid on the premium, with interest. Do not say anything to him, but either come up here, or send the administrator of your husband's estate, which would be better, and in conjunction with him our directors will take legal advice on

The Franklin Life Insurance Co. v. Sefton, Adm'r, *et al.*

the subject, and take the proper steps to secure you the money. We are ready to pay the loss at any time.

“Very truly yours,

“E. P. HOWE, Sec’y.”

These letters were objected to by the appellant on the ground, amongst other things, that they were irrelevant, incompetent, and not the act of the appellant; but the objection was overruled, and the letters admitted in evidence, and the appellant excepted.

We can discover no ground on which the letters were competent evidence for the plaintiff, and are of opinion that the court erred in admitting them. As the renewal premium was not paid until after the time stipulated for, whereby the policy became forfeited, the letters, if competent, would have a strong tendency to show the company was liable, and therefore, inferentially, that it had received the premium after the forfeiture, and had waived the forfeiture. The letters were not the act of the principal, the appellant, and can only be regarded as the mere statements of the agent. There was no evidence that the adjustment of losses was within the scope of the secretary's authority, or that he was authorized by the company to write the letters, or that his act in writing them was ratified by the company. The letters were not written in connection with, and as explanatory of, any act, whereby they might become a part of the *res gestæ*. In short, we see no ground on which their introduction can be maintained.

In the case of *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153, it was held that the statement of the secretary of the company, made in his office on the morning after the fire, to the officers of the church, that the church was insured at the time of the fire, was not competent evidence against the company. See, also, *Hynds v. Hays*, 25 Ind. 31, and *The Union Central Life Ins. Co. v. Thomas*, 46 Ind. 44.

In the progress of the trial, the plaintiff propounded the following question to a witness, viz.:

“Was it the custom of the company to receive payments

The Franklin Life Insurance Co. v. Sefton, Adm'r, *et al.*

of premiums after they were due?" To this question the appellant objected, on the ground that it was not competent to prove the custom; that the inquiry should be limited to the facts in this particular case. The objection was overruled, and exception taken. The witness answered as follows:

"There were positive instructions given by me to the sub-agents, and by the authorities of the company to me, that a premium should in no case be received after it was due, unless the party was in good health, although we sometimes received payments thirty days or even sixty days after they were due, particularly when it was in town here, and I could see the parties. I know of one or two instances in which it was refused at the office, when we had knowledge of the party's bad health."

We think the court erred in the admission of this evidence. The custom or usage of the company could not be set up to control the terms of the contract between the parties. 2 Parsons Con. 546; *Atkinson v. Allen*, 29 Ind. 375; *Clem v. Martin*, 34 Ind. 341; *Rafert v. Scroggins*, 40 Ind. 195; *King v. The Enterprise Ins. Co.*, 45 Ind. 43. Nor do we think the evidence admissible as affording an inference or presumption that in this case the premium was received by the company after it was due, and the forfeiture waived. Such evidence, for such purpose, is too remote and speculative to afford any just foundation for the inference.

The court charged the jury, amongst other things, that the receipt of the premium, by the agent of the company, after it became due, would bind the company without any ratification on the part of the company. This proposition is embraced in the second and fifth charges, which need not be set out in full.

The latter part of the fifth charge is as follows:

"I have already told you the action of the agent in accepting the premium for Cone, after the day it was due, in the absence of fraud, would bind the company without any subsequent ratification by the company."

The Franklin Life Insurance Co. v. Sefton, Adm'r, *et al.*

This proposition is wrong with reference to the policy sued upon. The policy contained a memorandum, as has been already stated, which was notice to the insured, that "agents of this company will receive premiums when due, but are not authorized, in any case, to make, alter or discharge contracts."

Here was abundant notice to the insured that the agent had no authority, by the receipt of the premium after it became due, or otherwise, to alter the contract by a waiver of the forfeiture. Doubtless, if the company had received from the agent and retained the premium, knowing all the facts, that would have been a ratification of the act of the agent and a waiver of the forfeiture. *The United Life, F. and M. Ins. Co. v. The Pres., etc., Ins. Co. of N. A.*, 42 Ind. 588. But this is not the proposition stated in the charges. We think, under such a policy as that in suit, the agent has no authority to receive the premium after it becomes due, and thereby alter the legal effect of the contract as to forfeiture in case of non-payment when due. The agent's powers in this respect are limited, and of this the insured has notice. This view is sustained by the following authorities: *Koelges v. The Guardian Life Ins. Co.*, 2 Lansing, 480; *Bouton v. The Am. Mutual Life Ins. Co.*, 25 Conn. 542; *Ryan v. The World Mutual Life Ins. Co.*, 41 Conn. 168; *Acey v. Fernie*, 7 M. & W. 150; *Catoir v. The Am. L. Ins. and T. Co.*, 33 N. J. L. R. 487; *Wall v. Home Ins. Co.*, 8 Bosw. 597.

There are some other questions discussed by counsel for the appellant, but as they may not arise upon another trial of the cause, and as this opinion has already been extended to more than usual length, we pass them over. The judgment, as between the appellant and the appellee Sefton, will have to be reversed for the reasons above given.

The judgment below in favor of the plaintiff against the insurance company is reversed, with costs, and the cause remanded for a new trial

Frost *et al.* v. Tarr *et ux.*

FROST ET AL. v. TARR ET UX.

CONTRACT.—*Promise to Make Provision in Will.*—*Damages.*—Where a person promises that, at his death, he will leave, give and bequeath a certain share of his estate to another, in consideration of certain service to be performed by the latter, an action for damages will lie for the violation of such promise, against the personal representative of the former, on behalf of said other person, he having performed said service under the contract, and the damages may be measured by the value of the portion promised, and the plaintiff will not be limited to the value of the service so performed by him.

STATUTE OF FRAUDS.—*Contract to be Performed at Death.*—A contract, which by its terms is to be performed at the death of one of the parties, is not within the provision of the statute of frauds which requires contracts not to be performed within a year from the making thereof to be in writing.

From the Orange Circuit Court.

F. Wilson and *M. F. Dunn*, for appellants.

T. L. Collins, for appellees.

DOWNEY, J.—Jane Tarr and her husband, Green Tarr, sued James Frost and Walter W. Chisman, executors of the will of Simeon Frost. The complaint is in two paragraphs. It is alleged in the first paragraph, in substance, that in March, 1846, the deceased entered into a contract with the father of the female plaintiff, to take her into his family and to board, educate and clothe her as his own child, until she was twenty-one years old, or was married, or until the death of the said Simeon Frost, and that she should live with him and his family during such time, and if she did so, he would, at his death, leave, give and bequeath to her a share or interest in his estate, equal in value to any share or interest had or received by any children of the said Frost; that he left surviving him two children and the descendants of three other children, who died before him; that she, in consideration thereof, by her said father, agreed to live with the deceased, as his own child in his family, and do and perform the usual labor and housework done by females in housekeeping, during said time. She alleges full performance of said contract on her part, and her marriage, on the

Frost et al. v. Tarr et ux.

22d day of August, 1855, to one Chatham; that Chatham died, and she afterwards married the said Green Tarr, her present husband; and the failure of the deceased to give, devise, or bequeath any part of his estate to her excepting the sum of fifty dollars; that the deceased left an estate of the value of twenty thousand dollars of real and personal estate, the greatest portion of which was bequeathed to James A. Frost, son of the deceased, wherefore plaintiffs demand judgment for one-sixth part of said estate, and for the sum of four thousand dollars, and other proper relief.

The second paragraph is for the price and value of work and labor done and performed by the female plaintiff for the deceased, at his request, in taking care of his house and family, and in performing the duties of house servant and housekeeper for said deceased for the space of nine years, of the value of three thousand dollars.

A demurrer to the first paragraph of the complaint was filed by the defendants, alleging that it did not state facts sufficient to constitute a cause of action, which was overruled by the court.

The defendants then answered:

1. A general denial.
2. That the cause of action did not accrue within six years before the commencement of the action.
3. That the contract or agreement mentioned in the complaint was not to be performed within one year from the making thereof, and the same was made in parol, and no memorandum or note thereof in writing, signed by the party charged, was made then or afterwards, by himself or any person thereunto by him lawfully authorized.

Reply in denial of the second and third paragraphs.

The trial was by a jury, and there was a verdict for the plaintiff, a motion for a new trial made and overruled, and judgment on the verdict.

It is assigned as error:

1. Overruling the demurrer to the first paragraph of the complaint.

Frost et al. v. Tarr et ux.

2. Refusing to grant a new trial.

As a reason why we should not consider the first alleged error, it is submitted by counsel for the appellees, that the court instructed the jury that they should disregard that paragraph of the complaint.

We do not find it necessary, however, to make the case, as to this point, turn on this ground. The objection made to this paragraph of the complaint is, that such a contract could not be enforced specifically, and that the plaintiff, if she could recover at all, must recover on a complaint for work and labor, such as the second paragraph of the complaint.

We think this position is untenable. It is true, that the contract alleged is one, the specific performance of which would not be decreed. But it does not follow, because a court will not decree specific performance of a contract, that therefore no action for damages will lie upon it when it has been violated. On the contrary, we think such action will lie, and that the damages in this case may be measured by the value of the portion which was promised, and that the plaintiff, in such case, is not limited to the value of the services performed, in the recovery. *Bell v. Hewitt's Ex'rs*, 24 Ind. 280; *Lee, Adm'r, v. Carter*, 52 Ind. 342.

On the trial, the court improperly put the case exclusively on the second paragraph of the complaint, excluded a part of the evidence offered in support of the first paragraph, and finally instructed the jury to disregard that paragraph, assigning as a reason therefor that the contract set up therein was one, the specific performance of which could not be decreed. The court, however, admitted evidence, and left it to the jury to say whether the cause of action accrued on the completion of the work, or not until the death of Frost. It is urged that this was an error. We hold that there was no substantial error in this. If, on account of the erroneous instruction to the jury to disregard the first paragraph of the complaint, the jury could and did regard the second paragraph only, still, we think the variance, if

Frost *et al.* v. Tarr *et ux.*

any, between the evidence and the second paragraph of the complaint might have been cured by an amendment in the circuit court, and should be regarded as having been so cured. If the compensation was to have been made at the death of the deceased, the statute of limitations would only run from that date, and the action was commenced in time.

There is nothing in the question made as to the section of the statute of frauds which requires contracts not to be performed within a year from the making thereof to be in writing. The contract might have been performed within that time in one event, that is, in the event of the death of Frost within the year. *Hill v. Jamieson*, 16 Ind. 125; *Bell v. Hewitt's Ex'rs*, 24 Ind. 280.

It is probable that, on account of the ruling of the court with reference to the first paragraph of the complaint, the amount which the plaintiff recovered was less than it otherwise might have been; but she is not complaining of this. We think there is no valid reason for reversing the judgment.

The judgment is affirmed, with five per cent. damages and costs.

BUSKIRK, J.—I concur in so much of the foregoing opinion as holds that the first paragraph was good, but I dissent from the portion of the opinion which holds that the court committed no error in overruling the motion for a new trial. The court below overruled the demurrer to the first paragraph of the complaint, and upon the trial admitted proof of the contract, but excluded evidence which was offered as a basis for the assessment of the damages, and finally directed the jury to entirely disregard the first paragraph. There is no doubt that the court possessed the power to set aside the submission of the cause to the jury and reform the issues; but having overruled the demurrer to the first paragraph, and an issue having been formed thereon, it possessed no power to direct the jury to disregard such issue. There is no cross-assignment of error by

Frost et al. v. Tarr et ux.

the appellees, and hence the court could not pass upon such rulings. We are bound to assume that the jury disregarded the first paragraph of the complaint. In that event, the plaintiffs were deprived of the right of trying the issue thereon. In determining whether the court erred in overruling the motion for a new trial, we are to regard only the second paragraph of the complaint. All the evidence that was offered tended to support the first paragraph. There was no evidence introduced which supported the common count for work and labor. As the verdict must have been based upon the second paragraph, the question is, whether it is sustained by the evidence, and I am very clear that it is not. If, however, there was evidence to support the second paragraph, the plaintiff was not entitled to recover, because the contract was barred by the statute of limitations. So, viewing the case in either aspect, the court, in my judgment, erred in overruling the motion for a new trial. I do not regard it as a question of variance, but a failure of proof. There is a marked difference between a variance between the allegations of the complaint and the evidence, and a failure of proof. *Buskirk Prac.* 336-340. The variance was not amendable in the court below, because the court charged the jury that the plaintiff could not recover on the first paragraph. The case made by the evidence was, that the female plaintiff was to be adopted as an heir, was to live with her grandfather until her marriage or arrival at age, and for her services she was to share equally with the children of her grandfather, and that he had died without making any provision for her in his will, or otherwise. Such evidence could not support a verdict based upon the second paragraph of the complaint.

 Ford v. Booker et al..

FORD v. BOOKER ET AL.

53	395
141	658
142	806

ASSIGNMENT OF ERROR.—*Sufficiency of Complaint.*—*Amendment of Statute.*—

The act of February 25th, 1875 (Acts 1875, Reg. Sess. 111) to amend section 54 of the code, being an amendment of a section which had already been amended, is void; and an objection to the sufficiency of a complaint may be taken for the first time by assignment of error on appeal to the Supreme Court.

PROMISSORY NOTE.—*Pleading.*—*Notice to Indorser.*—A complaint upon a promissory note against an indorser, which shows that by the statute of the state in which it was payable it was negotiable as an inland bill of exchange according to the law merchant, but does not allege notice of dishonor to the indorser, is bad on demurrer.

From the Allen Criminal Circuit Court.

J. Morris and *W. H. Withers*, for appellant.

W. H. Coombs, *W. H. H. Miller* and *R. C. Bell*, for appellees.

BIDDLE, J.—The complaint of the appellees sets out four several promissory notes, made by L. A. Pond, payable to the appellant, at the First National Bank, Chattanooga, Tenn., and endorsed by him to the appellees, and avers that such notes, by the statute of Tennessee, are negotiable in the same manner as inland bills of exchange by the custom of merchants, setting forth the statute. The complaint contains no allegation of protest of the notes, nor of notice to the endorser. Answer, denial; trial by the court; finding for the appellees against the appellant as endorser; judgment and appeal. A question was raised on the evidence below, but for want of a bill of exceptions, setting it out, it is not presented here. The sufficiency of the complaint was questioned by a motion in arrest of judgment below, and is also here, by an assignment of error. But it is argued by the appellees that the motion in arrest was made after judgment was rendered. It does not appear so by the statement in the record. We do not decide this point, however, as the insufficiency of the complaint is assigned for error in this court. In answer to this assignment, the appellees cite the

Williams et al. v. Venner et al.

amendment of section 54 of the practice act, Acts 1875, Reg. Sess. 111, which enacts that unless such objections to a complaint are taken either by demurrer or answer, they shall be deemed as waived; but this amendment, being an amendment of a section which had already been amended, was held void. Buskirk Prac. 172, and cases there cited. It is, therefore, proper to object to the sufficiency of the complaint for the first time in this court, by an assignment of error. 2 R. S. 1876, 59, sec. 54.

The complaint, having shown that the notes were negotiable as inland bills of exchange by the statute of Tennessee, is insufficient for not averring notice to the appellant as endorser. In support of this rule of the law merchant, established throughout the world, no authorities need to be cited.

The judgment is reversed, with costs; cause remanded for further proceedings, etc.

WILLIAMS ET AL. v. VENNER ET AL.

DESCENT.—*Widow.*—*Action to Recover Possession of Real Estate.*—A person died intestate, in 1861, seized of certain real estate in this State, leaving surviving him a widow and a child by her, and also children by a previous wife; and one-third of said real estate was set apart to said widow as such. Afterwards, her said child died, and she intermarried again, and had another child by her second husband, and joined her second husband in a conveyance of her said portion of said real estate.

Held, that said widow inherited one-third of the intestate's said real estate in fee simple, and that, without regard to the question as to her right to alienate her said portion during her subsequent marriage, said children of the intestate by a previous wife, or those representing their interests, could not recover the real estate so conveyed from one holding under said conveyance.

From the Decatur Circuit Court.

Williams et al. v. Venner et al.

J. S. Scobey, O. B. Scobey and J. D. Miller, for appellants.

S. A. Bonner and J. L. Bracken, for appellees.

BIDDLE, J. — Suit for the possession of real estate. Answer, denial. Trial by the court, finding for appellees, who were defendants below. Judgment on the finding, over a motion for a new trial, and exceptions. Appeal.

The only question made by the parties is as to the sufficiency of the evidence to sustain the finding. The facts are as follows:

Solomon Dillman died, intestate, in Decatur County, Indiana, on the 5th day of May, 1861, seized and in possession of a certain eighty acres of land, of which the land in controversy is a part. He left surviving him Rosetta Dillman, his widow, who was a second wife, and Emeline Dillman, William F. Dillman, Lafayette Dillman and Mahala J. Dillman, children by a previous wife, and Eliza Dillman, a child by his last wife, his heirs-at-law. The lands in dispute were set apart to Rosetta Dillman, in right of her inheritance as the widow of Solomon Dillman. Subsequently, Eliza Dillman, the daughter of Rosetta, died; and Rosetta afterwards intermarried with Eliel T. Willhoit, to whom she bore a child. On the 22d of July, 1862, Rosetta, joined by her husband, Willhoit, conveyed the lands described in the complaint to William George.

Without encumbering this opinion with names and abstracts of title, it may be stated at once that the appellants represent the interests of the children of Solomon Dillman by his first wife, and the appellees claim to stand on the rights of Rosetta Dillman, the second wife and widow of Solomon Dillman.

Section 17 of our statute of descents, 1 R. S. 1876, 411, enacts, that "if a husband die testate, or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors." Section 18 restrains the alienation of lands so inherited during a second or subsequent coverture. The proviso in section 24 enacts,

Louisville, New Albany and Chicago Railway Co. v. Boland.

“that if a man marry a second or other subsequent wife, and has, by her, no children, but has children alive, by a previous wife, the land which, at his death, descends to such wife, shall, at her death descend to his children.”

By these sections, it will appear that the general law of descents from husband to wife is regulated by section 17. Section 18 imposes a restriction upon the alienation of such lands during a second or subsequent coverture. The proviso in section 24, upon the contingency of having no children by a second or subsequent wife, diverts the inheritance back to the original heirs, who would have inherited the land if no second or subsequent marriage had taken place. The lands in controversy are not embarrassed by the proviso in section 24, because Solomon Dillman died leaving surviving him the child, Eliza Dillman, by his second wife. We think, therefore, that Rosetta Dillman, the widow, inherited the lands in fee simple, under section 17. We do not inquire what title, if any, Rosetta, with her subsequent husband, Willhoit, conveyed by their deed to William George. As the appellants must recover upon the strength of their title, and not upon the weakness of the title of the appellees, and as they have shown no title in themselves, the court below committed no error in its rulings. *Ogle v. Stoops*, 11 Ind. 380; *Philpot v. Webb*, 20 Ind. 509; *Newby v. Hinshaw*, 22 Ind. 334; *Smith v. Smith*, 23 Ind. 202; *Jackson v. Finch*, 27 Ind. 316; *Deweese v. Reagan*, 40 Ind. 513; *Small v. Roberts*, 51 Ind. 281. .

The judgment is affirmed, with costs.

53	398
138	606
139	360

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY CO.
v. BOLAND.

PLEADING.—*Negligence*.—In an action to recover for an injury caused by negligence or carelessness, whether it be an injury to the person or an

Louisville, New Albany and Chicago Railway Co. v. Boland.

injury to property, the complaint must show by direct averment, or it must appear from the facts therein alleged, that the plaintiff, or party injured, was himself guilty of no negligence which contributed to the injury.

From the Lawrence Circuit Court.

H. Crawford, for appellant.

G. W. Friedley, H. C. Duncan, W. H. Edwards and *G. Putnam*, for appellee.

WORDEN, J.—Complaint by the appellee against the appellant in three paragraphs.

Demurrer to each paragraph for want of sufficient facts; sustained as to third, but overruled as to first and second.

The first paragraph was as follows:

“William Boland complains of the Louisville, New Albany & Chicago Railway Company, and says that on or about the 22d day of April, 1873, as well as before and since that time, said railway company was the owner of and operated a railway passing into and through the county of Lawrence, and State of Indiana, and into and through the town of Mitchell, situate in said county; that said railway, at the time, passed near and opposite lots numbered three hundred (300), three hundred and forty-five (345) and three hundred and forty-six (346), in said town; that this plaintiff was then and still is the owner in fee of lots three hundred and three hundred and forty-five, aforesaid, together with all the appurtenances thereto belonging; that on lot numbered three hundred and forty-six was situated a hotel, belonging to one Mahala Richardson, known as the ‘Putnam House;’ that said lot three hundred and forty-six is situate between and adjoining said lots owned by plaintiff, as aforesaid; that at the time of the injury hereinafter complained of, there was situate and being on said lot numbered three hundred and two story frame house, then, and for a long [time] before that time, used by plaintiff for a dwelling-house; that on said lot number three hundred and forty-five, there was then a two story frame building, a portion of which was used for a saloon and billiard hall by

Louisville, New Albany and Chicago Railway Co. v. Boland.

plaintiff, and the residue was used and kept to rent to such persons and families as chose to occupy it; that on the 22d day of April, 1873, said railway company, in a careless and negligent manner, ran her engine and train of cars back and forth on said railway, near to and opposite the said lots of plaintiff and the said hotel; and plaintiff avers that at the time said cars and engine were being so run, at the place aforesaid, the smoke-stack of said engine, and the sieve and netting at the top and over the same were in bad repair; that said sieve and netting were burned and worn out and full of holes, and wholly inadequate to prevent the escape of fire and sparks of fire from the smoke-stack of said engine which facts were then and there well known to the defendant; and plaintiff avers that by reason of the defective character of said smoke-stack, and by reason of said sieve and netting being out of repair as aforesaid, large quantities of coals and sparks of fire escaped from said smoke-stack of said engine, and from and through said sieve and netting at the top and over said smoke-stack, and were carried and thrown upon and into the said hotel, by which said hotel was set on fire, and from which the fire was communicated to the said building on lot numbered three hundred and forty-five, and the same was entirely consumed, together with a stable of the value of three hundred dollars, a wood-house of the value of one hundred dollars, a smoke-house of the value of three hundred dollars, and one ice-house of the value of three hundred dollars, and one kitchen of the value of one hundred and fifty dollars, all being then and there situate upon said lot numbered three hundred and forty-five, and the property of the plaintiff; and the plaintiff further avers that by reason of the setting fire to and the burning of said hotel by the defendant, in the manner aforesaid, the said dwelling-house of the plaintiff, situate upon said lot numbered three hundred, was scorched and blackened and charred and damaged to the amount of five hundred [dollars]; and also on said lot numbered three hundred was situate one stable of the value of three hundred dollars, one wood-house

Louisville, New Albany and Chicago Railway Co. *v.* Boland.

of the value of one hundred and fifty dollars, one smoke-house of the value of three hundred dollars, one ice-house of the value of two hundred and fifty dollars, one kitchen of the value of four hundred dollars, all of which were entirely consumed by the reason of the setting fire to and the burning of said hotel, by the manner aforesaid, all the property of the plaintiff. And the plaintiff avers that if the defendant, at the time and place aforesaid, had used ordinary care and diligence in running and managing their said locomotive engine and cars, and had provided the smoke-stack of their said engine with such sieve and netting as is ordinarily and commonly used by railway companies, and had not carelessly allowed the same to become worn out, full of holes and worthless, sparks and coals of fire could [not] have escaped therefrom, and would not have been thrown from said engine upon and into said hotel, and the same would not have been set on fire, nor would fire have been communicated to plaintiff's house as aforesaid."

The second paragraph was based mainly upon the burning up of goods in the houses, by the fire, as alleged in the first paragraph, and the damages claimed by reason of the matters alleged in this paragraph were one thousand dollars.

On issue joined, there was a trial by jury, resulting in a verdict and judgment for the plaintiff for two thousand one hundred dollars.

Error is assigned upon the rulings of the court in overruling the demurrers to the first and second paragraphs of the complaint. It is objected that the first paragraph is bad, for the reason, amongst other things, that it does not show that the plaintiff himself was guilty of no negligence contributing to the injury.

It is established in this State, by a long line of decisions, that in an action to recover for an injury caused by the negligence or carelessness of another, the complaint must show that the plaintiff, or party injured, was himself guilty of no negligence which contributed to the injury.

Louisville, New Albany and Chicago Railway Co. v. Boland.

This may be shown by direct averment, or it may appear from the facts which are stated.

The rule, as one of pleading, had its origin, in this State, it is believed, in the case of *The President, etc., of Mount Vernon v. Dusouchett*, 2 Ind. 586, and has been followed in numerous instances since. It is suggested, however, by counsel for the appellee, that the rule has not been, and should not be, applied to cases of injury to property, which is incapable of either diligence or negligence; that it should be applied only in cases where the injury is personal.

The case above cited was one of injury to property, and not to the person.

We do not perceive any distinction in principle, in this respect, between injuries to the person and to property.

Where one's own negligence contributes to an injury to his property, inflicted by the carelessness of another, he can no more recover damages than if the injury were to his person. In such cases of concurrent negligence the law affords no remedy.

We are of opinion, therefore, that the rule of pleading above stated, as established in this State, is as applicable to cases like the one in judgment, as to cases of injury to the person.

There is no averment in the first paragraph that the plaintiff was without fault, or that the injury occurred without any contributory negligence on his part. Nor do we think the facts alleged exclude the conclusion that the plaintiff may have been guilty of such negligence. All the facts alleged may be true, and yet the plaintiff may have been guilty of negligence contributing to the injury.

We are of opinion, therefore, that the court erred in overruling the demurrer to the first paragraph.

The second, it seems to us, contained a sufficient averment in this respect.

It does not affirmatively appear that the appellant was not injured by the overruling of the demurrer to the first paragraph.

Shook *et al.* v. The State, *ex rel.* McCampbell.

The evidence is not in the record, nor does it in any manner appear but that the verdict and judgment were rendered in part upon that paragraph. Indeed, the judgment is for more than double the amount claimed as damages on the facts set up in the second paragraph.

Where a substantial error has been committed against a party, it is available to him on appeal, unless the record affirmatively shows that he was not injured thereby.

As the judgment below will have to be reversed for the reason before stated, we express no opinion upon the question whether the appellant would have been liable on the facts stated in the first paragraph, if it had been alleged that the plaintiff was free from negligence. There is some diversity in the authorities upon that point, and we prefer to pass it until the question shall be presented in the manner that requires its decision.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrer to the first paragraph of the complaint.

SHOOK ET AL. v. THE STATE, EX REL. MCCAMPBELL.

GUARDIAN AND WARD.—*Foreign Guardian.*—*Demurrer.*—*Capacity to Sue.*—

Where a foreign guardian sues to recover personal estate of his ward in this State, the fact that the complaint does not show that the guardian has complied with the provisions of the act of May 3d, 1869, 2 Rev. Stat. 1876, p. 593, in regard to the filing of an authenticated copy of his appointment, cannot render the complaint bad on demurrer assigning as cause the want of sufficient facts.

SAME.—*Suit on Guardian's Bond.*—*Pleading.*—Suit by a foreign guardian of a minor, upon the bond of a former domestic guardian of said minor, conditioned for the faithful discharge of said former guardian's duties as such guardian, and the faithful accounting for, and payment of, all moneys that might arise from the sale of certain lands of his said ward, ordered by the proper court, named, to be sold by said former guardian

Shook *et al.* v. The State, *ex rel.* McCampbell.

as such, it being alleged in the complaint that said former guardian, with his sureties, executed said bond, that said proper court ordered the sale of said lands, that, under said order, said former guardian sold said lands, that he received therefor a certain sum of money, that at a certain subsequent term of the proper court, named, he was removed from his guardianship and his letters superseded, and that he converted said money to his own use.

Held, that the complaint was not rendered insufficient by the fact that it did not allege the approval of the bond by the court or the appraisement, required by statute, of the property to be sold.

Held, also, that the allegation that the guardian converted the money to his own use showed a breach of the bond, and was sufficient without alleging in what manner the money was so converted.

Held, also, that the complaint was not insufficient for failing to show a demand, before suit, of the money due.

Held, also, that it was not necessary in such complaint to show that the original bond given by said former guardian upon his taking out letters of guardianship had been exhausted, or that the sureties thereon were worthless.

From the Ripley Circuit Court.

E. P. Ferris, for appellants.

G. Durbin, for appellee.

WORDEN, C. J.—This was an action by the State, upon the relation of McCampbell as guardian of the minor heirs of Charles N. Shook, deceased, against the appellants, upon a bond executed by David W. S. Shook, as the former guardian of the same heirs, and his sureties.

The bond was executed by Shook and his sureties, to secure the faithful discharge of his duties as such guardian, and the faithful accounting for, and payment of, all moneys that might arise from the sale of certain lands of the wards, ordered by the court of common pleas of said county to be sold by said Shook, as such guardian.

The defendants demurred to the complaint for want of sufficient facts, but the demurrer was overruled, and they excepted.

Such further proceedings were had in the cause as that final judgment was rendered for the plaintiff. No question is made here, except that arising upon the overruling of the

Shook *et al.* v. The State, *ex rel.* McCampbell.

demurrer to the complaint. We proceed to consider the objections now urged to the ruling.

It appeared by the complaint that the relator, McCampbell, was a foreign guardian, appointed by the Circuit Court of Muscatine county, Iowa; and it did not appear thereby that he had complied with the provisions of the act of May 3d, 1869, 2 Rev. Stat. 1876, p. 593, in regard to filing an authenticated copy of his appointment, etc. It is claimed by the appellants, therefore, that the demurrer should have been sustained; and the case of *Wade v. Fite*, 5 Blackf. 212, is cited in support of this view.

In that case, it was held, under the statute then in force, that if the appointment has been made in another state, the guardian must file a copy of his appointment, and give bond and surety for the faithful discharge of his duty, before his authority can be recognized in our courts.

Doubtless, also, the act of 1869 must be complied with, in respect to filing a copy of the appointment and giving bond, where the same is required, before a foreign guardian can proceed to take possession of property and sue for assets, as provided for by that act.

In the case cited, it does not at all appear how the question arose. Hence, that case throws but little light upon the question here involved.

Two questions on this point seem to arise. First, was it necessary that the complaint should show, affirmatively, that the relator had complied with the act of 1869? If so, was the objection taken in the proper manner? The view which we take of the second question renders it unnecessary that we should pass upon the first.

Assuming, without deciding, that the complaint should have shown by its averments that the relator had taken the steps required by the act of 1869, in order to authorize him to sue, still, a demurrer assigning for cause only the want of sufficient facts does not reach the defect. There are facts enough averred, as will be seen hereafter, to constitute a cause of action against the defendants, in favor of the minor

Shook *et al.* v. The State, *ex rel.* McCampbell.

heirs of Charles N. Shook, deceased. They could sue by their next friend or by their guardian.

If that guardian had not taken the necessary steps to authorize him to sue, as such, the objection went to his capacity to sue, and the demurrer should have pointed out this objection.

The want of capacity to sue is made a specific ground of demurrer, where the defect appears upon the face of the complaint; and where it does not thus appear, the objection may be taken by answer; and if not taken in either of these modes, it is waived. 2 Rev. Stat. 1876, p. 56, sec. 50; p. 59, sec. 54. See, as to the point that in such case the demurrer should specify the want of capacity to sue, as the ground thereof, Voorhies' Code, 1873, p. 206, note to subdivision 2.

It is objected that the complaint does not allege that the bond was approved by the court. The statute provides for the approval of such bonds by the court authorizing the sale of the property. 2 Rev. Stat. 1876, p. 596, sec. 19.

The complaint does not, in terms, allege that the bond was approved by the court; but it alleges that the guardian, with his sureties, executed the bond.

The term "execution," as applied to the making of deeds or written contracts, includes the delivery.

The statute last above cited provides, that, "upon such bond being filed and approved by the court, the court shall order the sale of such real estate," etc. The complaint alleges that the court ordered the sale of the property.

Now, as the court could not rightfully have made the order for the sale of the land by the guardian, without having approved the bond, and as it will be presumed that all things have been rightfully done in a court of justice, unless the contrary appear, it will be presumed that the court approved the bond.

It is also objected, that the complaint does not show the appraisement of the property to be sold, as required by the statute, whereby the amount of the bond to be given might be ascertained. As the property was ordered to be sold, it

Shook *et al.* v. The State, *ex rel.* McCampbell.

will be presumed, the contrary not appearing, that all the necessary preliminary steps were properly taken.

The complaint alleges the sale, by said guardian, under the order of the court, of several parcels of real estate, describing them particularly, and that he received therefor several sums of money, amounting to over twelve hundred dollars, and that, at the February term of the Ripley Circuit Court, for the year 1874, he was removed from the guardianship of said wards, and his letters superseded

The following breaches are assigned:

"1. The said David W. S. Shook, as such guardian, received the several sums of money hereinbefore specified, upon the sale of said real estate, and converted the same to his own use, and has refused to pay the same into court when ordered to do so, or to expend the same in the education, support and maintenance of his said wards.

"2. That he has failed to account for the money arising from said sales, according to law."

It is objected that these breaches are insufficient; that the second is a mere conclusion of law, and that the latter part of the first is insufficient, because it is not averred that any order of the court was ever made to pay the money into court, nor that it was necessary to expend any money for the education, support and maintenance of the wards.

And it is objected, that the part of the first breach which charges that the guardian converted the money received by him on the sale of the land to his own use is insufficient, because it does not show how it was converted; and, in support of this objection, the case of *Kidwell v. The State, ex rel. Boyden*, 45 Ind. 27, is cited. That was a case of the conversion of promissory notes, and not of money.

We think that the allegation that the guardian converted the money to his own use was sufficient, without showing how, or in what manner, it was converted to his use.

And we think the allegation that the guardian converted the money to his own use shows a breach of the bond;

Bissot v. The State.

therefore, we need not inquire as to the sufficiency of the residue of the breaches.

It is also objected, that the action cannot be maintained, without a previous demand of the money due. We are of a different opinion.

The statute provides, that "it shall be the duty of every guardian of any minor, * * * at the expiration of his trust, fully to account for and pay over to the proper person, all of the estate of said ward remaining in his hands." 2 R.S. 1876, p. 589, sec. 9. When the guardian was removed, his trust expired, and it was his duty to pay over the money of his wards to the proper person without demand. *Voris v. The State, ex rel. Davis*, 47 Ind. 345.

Finally, it is objected, that the bond could not be sued upon until the original bond, given by the guardian upon his taking out letters of guardianship, was exhausted, or the sureties thereon were shown to be worthless. The authorities are the other way.

The cases upon this point are collected in the case of *Colburn v. The State, ex rel. Arnold*, 47 Ind. 310, and we need not here go over them again.

There is no error in the record, and the judgment below must be affirmed.

The judgment below is affirmed, with costs, and five per cent. damages.

BISSOT v. THE STATE.

CHANGE OF VENUE.—*Counter Affidavits.*—*Judicial Discretion.*—Motion by a defendant in a criminal action for a change of venue, founded on his affidavit that he could not have a fair and impartial trial because of the excitement and prejudice against him and his defence in the county, which affidavit was met by the affidavit of sixty citizens residing in different parts of the county, that they had a general acquaintance with the citizens of

Bissot v. The State.

their respective neighborhoods, that they had heard of no excitement or prejudice against the prisoner, and that, from their knowledge and acquaintance with the citizens of the county, the prisoner could have a fair and impartial trial of his case at that term of the court.

Held, that the question was one within the sound discretion of the court, and that there was no abuse of such discretion in overruling the motion.

CRIMINAL LAW.—Murder Committed in the Perpetration of Burglary.—Where, after a person had burglariously broken and entered into a house, and while he was yet within the house, and immediately after a watchman, who came to the door by which said person had so entered, had shot at such person, he shot and killed the watchman;

Held, that the homicide, being committed within the *res gestæ* of the burglary, was committed "in the perpetration" of the burglary, within the meaning of section 2, 2 R. S. 1876, p. 423.

INSTRUCTIONS TO JURY.—A defendant in a criminal action cannot complain of an instruction given to the jury which is favorable to him, or of the refusal of the court to give an instruction asked by him, where the court in its charge fully and correctly instructs the jury upon the question involved in the instruction refused.

SAME.—An instruction to the jury which, as far as it is given, is not wrong, will not be held erroneous merely because it is not more complete.

SAME.—Not Applicable to Evidence.—It is not erroneous to refuse to give to the jury an instruction asked, though it correctly expresses an abstract principle of law, if there is no evidence in the case to which it is applicable.

NEW TRIAL.—Surprise.—A new trial will not be granted to the defendant in a criminal action, on the ground of surprise in the testimony of a witness, where the testimony alleged to be a surprise is immaterial.

SAME.—Newly-Discovered Evidence.—A new trial will not be granted because of newly-discovered evidence, where no diligence is shown, and no reason why the evidence was not discovered sooner, and no reasonable probability that it can be produced.

CRIMINAL LAW.—Conviction Under One Count and Acquittal as to Another.—On the trial of an indictment containing two counts, the first charging a homicide committed by the defendant "purposely and with premeditated malice," and the second charging the killing to have been done "purposely and with premeditated malice, in the perpetration of burglary," an acquittal as to the first count and a conviction on the second did not acquit the defendant on the whole indictment.

From the Lawrence Circuit Court.

C. L. Dunham and — Meriweather, for appellant.

C. A. Buskirk, Attorney General, and R. W. Miers, Prosecuting Attorney, for the State.

Bissot v. The State.

BIDDLE, J.—George Bachtel and Arthur Bissot were indicted for the murder of George J. Carney. The indictment contains two counts. The first for murder in the first degree, and the second for murder committed in the perpetration of a burglary with intent to commit larceny. Motions to quash were made to each count, and overruled. Bachtel pleaded guilty. Bissot pleaded not guilty, and moved the court for a continuance of the cause, founded on affidavits as to the absence of witnesses; whereupon, the State admitted the truth of the facts to which, as it was alleged, the witnesses would testify, and the court overruled the motion. Bissot then moved the court for a change of venue, founded on his affidavit, to which the State filed counter affidavits, and the court overruled the motion. To each of the above rulings Bissot excepted. Trial by jury; verdict, guilty on the second count; motion for a new trial overruled; exception; motion to discharge the prisoner for the reason that the verdict amounts to an acquittal, overruled; exception; judgment; appeal.

It is unnecessary to more particularly state the record here, as we shall notice the errors alleged against the proceedings in the order in which they are discussed by the counsel for appellant.

1. That a change of venue should have been granted to the defendant.

The affidavit of the prisoner, that he could not have a fair and impartial trial, because of the excitement and prejudice against him and his defence in the county, was met by the affidavit of sixty citizens residing in different parts of the county, that they had a general acquaintance with the citizens in their respective neighborhoods; that they had heard of no excitement or prejudice against the prisoner; and that, from their knowledge and acquaintance with the citizens of Lawrence county, the prisoner could have a fair and impartial trial of his case at that term of the court.

It is admitted that this question was one within the sound

discretion of the court, and we cannot see that it was unsoundly exercised.

2. That the verdict of the jury and the judgment of the court are not sustained by the evidence.

We need not consider this question in reference to the first count of the indictment, because upon that the prisoner was acquitted.

The circumstances of the homicide were stated by Bachtel—the co-defendant of Bissot in the indictment—who was called as a witness by the State, as follows:

“On the night of the 19th of January, 1875, or the morning of the 20th, about midnight, I and the defendant, Bissot, broke into the drug store of J. W. Mitchell & Co., in Bedford, in this county, for the purpose of robbing it. We entered by the back door; we took a light of glass out of the back door, reached through and unlocked it; we were at the desk; Carney stepped just inside of the door, and said, “Who are you? Speak, or I will shoot.” I exclaimed, “Don’t shoot!” But before the words were hardly out of my mouth, Carney did shoot at Bissot. Then Bissot shot at Carney with a duelling pistol. I snapped my pistol at Carney, after Carney shot at Bissot. I do not think my pistol went off. I did not see Carney any more. When the smoke cleared away, we went out of the drug store and made our way out of town.”

There was no evidence contradicting this statement; nor was it essentially impaired by the cross-examination. It appeared, in other portions of the evidence, that Carney was the marshal of the town and watchman of the building wherein the burglary was alleged to have been committed.

The section upon which the indictment is founded (2 Rev. Stat. 1876, 423, sec. 2) is expressed in the following words:

“If any person of sound mind shall purposely and with premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill any human being, such person shall be deemed guilty of

Bissot v. The State.

murder in the first degree, and upon conviction thereof shall suffer death."

In this case, that the burglary and homicide were both committed, there can be no reasonable doubt; but it is insisted that the homicide was not committed "in the perpetration" of the burglary; and, therefore, being unconnected with the burglary, the facts do not warrant a conviction in a higher degree than manslaughter, if, indeed, they do not excuse the prisoner entirely; that the burglary was consummated as soon as the burglarious entry was made with the felonious intent as charged; and that, as the homicide was committed after the entry, it was not, therefore, committed "in the perpetration" of the burglary. If this construction were to be given to the statute, it would be quite impracticable to ever convict for a murder committed in the perpetration of any of the felonies mentioned in this section. The intention of the legislature, in enacting the section, was, doubtless, to class certain homicides in the highest degree of murder without containing the ingredient of premeditation, malice, or intention, which otherwise could not possibly be of a higher degree than manslaughter, and, in many cases, might not amount to criminal homicide at all. In this case, take away the elements of burglary which surround it, and the prisoner might plausibly contend that he had committed nothing more than excusable homicide; for it appears that the deceased shot at him first, and thus put his life in immediate jeopardy. It could not be higher than manslaughter, at most; and in such cases it might be accidental, and then, if held not to be "in the perpetration" of the burglary, would be excusable. If the charge was murder committed "in the perpetration" of a robbery, as soon as the accused had forcibly and feloniously, or by violence or putting in fear, taken from the person of another any article of value, the robbery would be consummated; yet, if immediately afterwards, in the struggle to release himself and escape, he had killed his victim, the degree of the homicide, unconnected with the robbery, would be no higher than man-

slaughter. So, if the charge was murder committed "in the perpetration" of arson, as soon as the criminal had wilfully and maliciously set fire to a dwelling-house, the arson would be accomplished, and he could flee; yet it might be that some human being was in the building at the time, and hours afterwards was consumed in the flames. In such a case, the homicide, if held not to be committed "in the perpetration" of the arson, would be merely manslaughter, being a homicide perpetrated in the commission of an unlawful act, without malice, express or implied, although the felon had committed two crimes of the most shocking character. True, the homicide might be murder in such a state of facts, when it was committed with premeditation, malice, and intention, and the arson was merely the means of accomplishing the crime. And if the charge was murder committed "in the perpetration" of a rape, as soon as the felon had unlawfully and forcibly, and against the consent of the woman, effected sexual penetration, the crime by statute would be complete; yet, if he still persisted in his nefarious object, until he had accomplished the natural purpose of the sexual act, and in such persistence killed his victim, if it was held not to be "in the perpetration" of the rape, he would be guilty of only the lowest degree of homicide, although he had committed the foulest and also highest crime known against nature.

Although we must construe criminal statutes strictly, adhere closely to the definition of crimes, and interpret technical words according to their fixed meaning, yet we cannot give to the section under consideration the construction contended for by the appellant. In our opinion, where the homicide is committed within the *res gestæ* of the felony charged, it is committed in the perpetration of, or attempt to perpetrate, the felony, within the meaning of the statute; and, being convinced in this case that the burglary charged was committed, and that the homicide was committed within the *res gestæ* of the burglary, we must hold that it was committed in the perpetration of the burglary, within the true

Bissot v. The State.

intent and fair meaning of the statute. It seems to us that such a construction is safe to the State and the citizen, and the only one by which the intention of the legislature can be practically carried into effect. And we think, according to this view, that the evidence in this case fairly warrants the conclusion, beyond a reasonable doubt, that the homicide alleged was committed "in the perpetration" of the burglary, as charged in the indictment.

3. It is insisted by the appellant, that the court erred in giving instructions to the jury.

The first specific objection made is, that a certain instruction implies that the jury must take the law from the court. The language of the instruction is as follows:

"By the constitution of Indiana, you are the judges of the law as well as the facts. Upon the facts of the case we have nothing, whatever, to say; it is your exclusive province to decide upon them; ours is to instruct you in regard to the law; and while I shall endeavor to give you a plain, clear, and impartial statement of the law pertaining to the points that arise and grow out of this case as presented, you are to also remember that it is not intended thereby to thus bind your consciences, but to enlighten your judgments, if so be you should so regard it."

We can see no error in this instruction.

The second objection is to the following instruction:

"The indictment contains two counts, or independent charges of murder; but these two charges arise on the same state of facts. The first count is for murder in the first degree; the second is for killing in the perpetration of a burglary. It is proper to thus charge the offence in different ways, so as to meet the evidence on the trial."

It is urged that this charge is erroneous, because the law applicable to each count in the indictment is essentially different. The instruction does not state that the same law and the same state of facts will support either count, but that the two charges arise on the same state of facts, and that

the offence is charged in different ways, so as to meet the evidence on the trial. This is not erroneous.

The court also instructed the jury, that "homicide may be lawful or unlawful; it is lawful when it is justifiable, as in war or self-defence, and in the execution of legally condemned criminals." That homicide "is lawful when it is justifiable," seems, to our way of thinking, a self-evident proposition; and as there is no evidence of "war" or "execution" in this case, we do not think the appellant can complain because the court told the jury that homicide was justifiable in self-defence.

Another instruction complained of was as follows:

"It is not necessary for me to go into this subject particularly, further than to present to you the distinction to be taken between murder in the first and second degrees and manslaughter, and, so far as it may be proper, to apply it to the case in hand."

The court then proceeds at length to define these distinctions, which is correctly done, in the course of which it says, that "manslaughter is the unlawful killing upon a sudden heat, without malice, express or implied," and does not give the other branch of the definition of manslaughter, namely, a killing in the commission of some unlawful act. It is objected to this instruction, or rather these instructions, for they contain several unnumbered sentences, that no part of it relates to excusable homicide, and that it does not give a correct definition of malice, but is calculated to mislead and confuse the jury. Wherein it is calculated to "mislead and confuse the jury" is not pointed out; and as to malice, we think it was correctly defined, but, if not, as the prisoner was acquitted on the first count in the indictment, malice becomes immaterial, because it is not a necessary ingredient in the crime charged in the second count, upon which the prisoner was convicted; and if the prisoner desired any instruction to be given to the jury relative to excusable homicide, it should have been requested of the court on his behalf. Not having done so there, it must be held as

Bissot v. The State.

waived here. An instruction, which, as far as it is given, is not wrong, will not be held erroneous in this court merely because it is not more full and complete.

The appellant also complains of an instruction defining burglary, and the crime charged in each count of the indictment, but we can see no objection to that part of the charge. Indeed, it would be surprising to us to find an error in the proceedings of a circuit court in a matter so elementary as the definition of a crime. In the course of the same instruction, the court said:

“But if you find * * * that while carrying out said burglary, the deceased, a night watchman, came up to the door by which the defendant and Bachtel had entered, and then defendant, for the purpose of escaping, and not for the purpose of further prosecuting said burglary, fired upon deceased and killed him, then you could not find the defendant guilty of murder in the first degree, for a killing in the perpetration of a burglary, but in such case it would be with the intent to escape.”

We think this part of the instruction, up to the very edge of the law, was favorable to the prisoner. Indeed, it seems to us that the State would have had more ground to complain of it, as applicable to the second count of the indictment, than the appellant.

We have thus examined all the instructions given by the court in the case, and upon careful consideration are unable to find anything in them of which the appellant has a right to complain.

4. The appellant asked several instructions, which the court refused to give.

“1. If an officer, in attempting to make an arrest, uses more force than is necessary, he becomes a wrong-doer, and the person sought to be arrested may resist such excessive force by force, even to the taking of life, if necessary to save his life or to protect himself from great bodily harm.”

The court refused this instruction, and gave the following:

“2. If an officer, or other person, who attempts to pro-

vent another from committing a felony, uses more force than is reasonably necessary, he becomes a wrong-doer, and the person sought to be prevented may resist said excess of force by force, even to the killing, if necessary to preserve his own life from such excessive use of force or to save himself from great bodily harm."

We see no error in this. The instructions are essentially the same in principle, while the latter is more applicable to the case.

The court also refused the following instruction asked by the appellant:

"5. A defendant has a right peaceably to evade arrest."

Conceding that this correctly expresses an abstract principle of law, there was no evidence in the case to which it was applicable. It was, therefore, not erroneous to refuse it. This question has often been decided by this court.

And the following instruction was asked by the appellant, and refused by the court:

"7. If the reasonable doubt arise out of the transaction itself, the burden of proof is not shifted upon the defence, and the defendant must be acquitted."

But the court instructed the jury upon the same question as follows:

"You are to be satisfied beyond a reasonable doubt of all the material facts necessary to be proved to make out the case."

The court then, after endeavoring to more particularly explain a reasonable doubt, proceeds:

"It is not a mere speculative doubt, voluntarily excited in the mind, as an evasion of a disagreeable duty; on the other hand, you are required to be satisfied to that degree that excludes from your minds all reasonable doubt as to the guilt of the accused."

The court also added, further:

"And on this point, I also give you an instruction asked for by the defendant, as follows:

Bissot v. The State.

“6. The question of reasonable doubt goes to every material allegation of the indictment, and if there is a reasonable doubt as to any one of those allegations, the jury must acquit.”

We think this goes fully to the question of reasonable doubts, and covers the whole ground of the case as to that point; besides, there was no question in the evidence of shifting the burden of proof upon the defence, and no evidence offered by the prisoner that was rejected.

5. The appellant also claims that he should have had a new trial on account of surprise in the testimony offered by the State, and for newly-discovered evidence. These grounds are founded upon two affidavits stating that the appellant was surprised by the testimony of J. W. Norris, who testified on the trial that the appellant had said to him, while in the Olney jail, “We did not burn the stables, but I don’t deny shooting the marshal at Bedford;” also, that he believes he can prove by R. A. Kincade that Norris said to Kincade, “I never heard the boy say anything about shooting the marshal,” but that Bachtel had talked to him, Norris, about the shooting, and confessed to the killing of Carney; that the affiant did not ascertain that he could prove such facts by said Kincade until since his trial.

As to the testimony which is alleged as a surprise, it seems to us, in the light of the evidence in the case, to be quite immaterial. The homicide is proved beyond a reasonable doubt.

As to the newly-discovered evidence, no diligence is shown, and no reason why it was not discovered sooner. In neither case is the affidavit of Kincade produced, by whom he expects to contradict the admission made to Norris and prove the newly-discovered facts, because, as is alleged, Kincade “had left for his home in the State of Illinois;” but at what time he left, and where his home in Illinois is, are not stated; and no reasonable probability that his testimony can ever be procured is shown. The affidavits, in our judgment, are insufficient.

6. And lastly, the appellant insists that the verdict of the jury amounted to a verdict of acquittal. His argument in support of this proposition is as follows:

“The first count charges the killing to have been done ‘purposely and with premeditated malice.’ This is certainly the most criminal degree of homicide known to law or reason. The second count charges the killing to have been done ‘purposely and with premeditated malice,’ the very language in which the highest degree of homicide is charged in the first count; to it only is added, that it was done ‘in the perpetration of burglary.’

“Is not the last allegation merely surplusage?

“The crime of murder was completely set out in this count, as in the first, without it; for if the killing was done purposely and with premeditated malice, it made no difference what the defendant was doing at the time it was done, whether in the commission of a burglary or otherwise, for it was done purposely and with premeditated malice, which made it murder in the first degree, in and of itself. If so, then the acquittal upon the first count was an acquittal of the charge of killing purposely and with premeditated malice, as alleged in the second count, and must be construed as a complete acquittal of the gravamen of the charge of the whole indictment.”

We do not perceive the force of this argument. That an acquittal on the first count, and a conviction on the second, should acquit the defendant on the whole indictment, is a new proposition to us, and one which we cannot regard as sound.

We have thus gone through the record, examined each exception taken by the appellant, and are unable to find any error in the proceedings. Indeed, it seems to us that the appellant was properly indicted, fairly tried, and justly convicted, according to the law and the facts. We cannot, therefore, disturb the judgment.

The judgment is affirmed.

53	490
127	180
53	490
140	303
140	364
53	420
d167	391

GREER v. THE STATE.

EVIDENCE.—*Testimony of Party as to His Intent.*—Where, on the trial of an action, a party, competent to testify in his own behalf, becomes a witness, and the character of the transaction in question depends upon the intent of such party, it is competent for him to testify as to what his intention was; accordingly, where, on the trial of an indictment for an assault and battery with intent to commit a felony, the defendant became a witness in his own behalf, it was competent for him to testify as to what his intention was in committing the alleged assault and battery. *Zimmerman v. Marchland*, 23 Ind. 474, overruled on this point.

INSTRUCTION TO JURY.—*Credibility of Witness.—Interest.*—On the trial of a criminal action, it was error for the court to charge the jury, in reference to the testimony of the defendant, who had been a witness in his own behalf, that “one interested will not usually be as honest and candid as one not so.”

From the Marion Criminal Circuit Court.

J. C. Green, J. C. Pearson and J. S. Campbell, for appellant.

C. A. Buskirk, Attorney General, for the State.

WORDEN, C. J.—The appellant was indicted for an assault and battery upon the person of a female, with intent to commit a rape upon her; and, upon trial by jury, was convicted and sent to the state prison.

Upon the trial of the cause, the defendant became a witness on his own behalf, and it was proposed by his counsel to prove by him what his intention was in the commission of the alleged assault and battery, but, on the objection of the State, the evidence thus offered was excluded, and the defendant excepted.

The intent was the gist of the felony charged, and it devolved upon the State to make it out.

It was also the right of the defendant to disprove the alleged intent by any competent evidence.

No one could know better than the defendant what his intent was, and as he was a competent witness, we see no reason why it was not competent for him to testify as to his intent.

The degree of credit that should be given to his testimony, in this respect as well as in others, would be for the consideration of the jury. Any objection to the proposed evidence would, we think, go to his credibility, and not to his competency.

That such evidence is competent, is thoroughly settled in New York. Thus, in *Thurston v. Cornell*, 38 N. Y. 281, it was said by the court, that "the law is now well settled, under the rule admitting parties to testify in their own behalf, that, where the character of the transaction depends upon the intent of the party, it is competent, when that party is a witness, to inquire of him what his intention was;" and several previous cases in that State are referred to, which fully sustain the position.

We are aware that in *Zimmerman v. Marchland*, 23 Ind. 474, it was held not competent for a party thus to testify to his intention; but that case, in this respect, does not seem to have been very maturely considered, and no authorities are cited, leaving the inference that the attention of the court was not called to the New York cases upon this point.

The case of *The City of Columbus v. Dahn*, 36 Ind. 330, settles nothing upon this point, though some of the New York cases are referred to; for it was decided upon the ground that a party, whose acts and conduct indicated an intention to dedicate certain ground to the public for a street or highway, is estopped to set up an intent different from that indicated by his acts and conduct.

We are of opinion that the evidence offered was competent, and should have been received.

The court gave to the jury the following charge, to which exception was taken, viz.:

"The defendant has testified in his own behalf. This testimony, however, is subjected to the usual test of credibility, as other interested witnesses. One interested will not, usually, be as honest and candid as one not so."

We think the court erred in giving the latter part of the charge. The idea is conveyed by the charge, that, in a

The Board of Commissioners of Hancock County *v.* Bradley.

majority of instances, or as a usual rule, subject of course to exceptions, persons interested will not be as honest and candid as those who are not interested. This may be true, in point of fact, and if so, it is a sad commentary upon the honesty and candor of a majority of mankind. But, if the proposition be true, it is not a legal presumption, but matter of fact, of which the jury were the exclusive judges, and concerning which the court could not, without going out of its province, undertake to instruct them.

It was the exclusive province of the jury to determine, from their knowledge of mankind, from the evidence in the cause, and from the appearance and manner of the witness, what credit was due to his evidence, and whether any, and if so, how much, credence should be withheld in consequence of his interest in the cause. It was, in short, the exclusive province of the jury to determine whether one interested would or would not usually be as honest and candid as one not interested.

There are some other questions made in the cause in respect to evidence, which we pass over, as they may not arise upon another trial.

The judgment below is reversed, and the cause remanded for a new trial. The clerk will give the proper notice for a return of the prisoner.

THE BOARD OF COMMISSIONERS OF HANCOCK COUNTY *v.*
BRADLEY.

COUNTY COMMISSIONERS.—*Allowance by. — Collateral Proceeding. — County Treasurer.*—To a suit by a board of county commissioners against a late treasurer of the county for money received by him as such treasurer and not paid over, it was a good defence that, the defendant having lost said money by burglary and larceny, the board of commissioners of the county, in a settlement with him as such treasurer, allowed him the amount so

The Board of Commissioners of Hancock County v. Bradley.

lost, and ordered that he be relieved and discharged from the payment thereof, which action of the board of commissioners had not been appealed from and remained in force.

From the Hancock Circuit Court.

W. March, H. J. Dunbar, G. H. Chapman and U. J. Hammond, for appellant.

W. R. Hough, for appellee.

PETTIT, J.—The appellant sued the appellee, late treasurer of the county, for money alleged to have been received by him, and which he had not paid, etc.

There was answer in three paragraphs, the third one of which was as follows, viz.:

“Par. 3d. And the defendant, further answering said complaint, says that he admits that he was duly elected and qualified, and gave bond as, and that he acted as treasurer of said county from the —— day of November, 1865, until the —— day of November, 1867, and that during said term there came into his hands, as such treasurer, the sum of money alleged therein, which money belonged to the plaintiff, and which was received from the source in said complaint averred; but says that the plaintiff ought not to have and maintain this action against him, because he says that, on the night of the 12th day of January, 1866, the room and office which he was occupying as such treasurer, at and under the direction of the plaintiff, the same being the southwest room in the lower story of the court-house of said county, was feloniously and burglariously broken open and entered, without the knowledge or consent of the defendant, by some person or persons, who were then, and still are, unknown to the defendant, and the fire and supposed-to-be burglar-proof safe, then and there being in said room, and in which said moneys, together with large amounts of other money, were then deposited, was then and there, by said person or persons, feloniously broken open, and said moneys feloniously stolen and carried away, and that the same, nor any part thereof, has ever been recovered or heard of by the defendant since; and that afterwards, to wit, on the ——

The Board of Commissioners of Hancock County v. Bradley.

day of June, 1866, the plaintiff, as such board of commissioners of said county, being then in regular session, a full settlement was then and there had between the defendant and the plaintiff, in which said settlement the plaintiff allowed the defendant the full sum of five thousand dollars, on account of the moneys so stolen as aforesaid; all of which now fully appears by reference to the records of said board of commissioners, remaining in the auditor's office of said county, a copy of which is filed herewith, made a part of this paragraph, and marked exhibit 'A;' and that said allowance of said plaintiff, acting as such board as aforesaid, has never been appealed from and remains in full force.

"That, at the time of, and by said settlement, the plaintiff found and adjudged that there was then in the defendant's hands, as such treasurer, and for which he was liable to account, a balance of eight thousand one hundred and fifty-four dollars and ten cents, and only that amount, as shown by said record (exhibit 'A'); and that the defendant, as such treasurer, in his settlement thereafter made with the plaintiff, at the time and in the manner prescribed by law, fully accounted to the plaintiff for said balance of money, eight thousand one hundred and fifty-four dollars and ten cents, together with all other moneys that came into his hands as such treasurer thereafter; and that at the expiration of his term of office as such treasurer, he fully accounted for and paid over to his successor in said office all of the moneys with which he was chargeable as such treasurer, including said balance, eight thousand one hundred and fifty-four dollars and ten cents. Wherefore he demands judgment.

"D. S. GOODING,

"W. R. HOUGH,

"C. G. OFFUT,

Def't's Att'ys."

Copy of exhibit "A," filed with answer:

"State of Indiana, Hancock county:

"Commissioners' Court, June session, 1866. Friday morn-

The Board of Commissioners of Hancock County v. Bradley.

ing, half past eight o'clock, June 8th, 1866, and fifth day of term, the board met; present, Elias McCord, William New and John Heinchman.

““State of Indiana, Hancock county:

““Nelson Bradley, treasurer of said county, submits the following report of receipts and expenditures on account of said county, from the 1st day of June, A. D. 1865, to the the 1st day of June, A. D. 1866: .

““RECEIPTS.

Bal. in treasury, June 1st, 1865,	\$14,544.62
Delinquent tax since received,	3,475.17
Fines since received,	154.24
Principal, school fund,	450.27
Interest, common fund,	609.00
Principal, Cong. fund,	892.57
Int., Cong. fund,	650.66
Docket fees,	27.00
Redemption lands,	172.96
Office rent and wood,	160.37
Shows,	45.00
Excess school-tax,	2,336.51
State tax, col. on duplicate,	12,077.77
School tax,	7,887.88
Sinking fund tax,	4,528.47
County tax,	23,559.84
Road tax,	4,955.31
Township tax,	1,914.05
Soldiers' families,	14,259.71
Special school tax,	6,328.35
Township library tax,	438.13
Dog tax,	803.00
Estray fund,	38.10
Liquor license,	50.00
Sale of poor farm,	2,000.00
Total receipts,	\$102,358.98
Total expenditures,	94,204.88

The Board of Commissioners of Hancock County v. Bradley.

Bal. in treasury, June 1st, 1866, . . . 8,154.10

“ ‘All of which is respectfully submitted.

“ ‘NELSON BRADLEY, Treas. Hancock Co.’

“ Which report was examined and approved by the board.

“ ‘EXPENDITURES.

	Principal.	Interest.
Vol. orders redeemed,	\$14,735.46	\$511.17
County officers,	3,126.31	14.90
Road,	13.82	
Prison,	108.65	
Bailiffs,	568.50	1.51
Stationery,	300.20	6.90
Poor,	3,381.39	39.74
Assessors,	530.00	17.40
Printing,	838.60	10.60
Judge's salary,	250.44	
Specific,	1,007.13	6.85
Election,	75.11	.23
Redemption land,	161.73	
Refunded interest,	6.88	
Principal com. fund,	1,945.00	
Principal Cong. fund,	100.00	
In lieu of road receipts,	3,470 36	
Cong. int. distributed,	834.51	
Special school tax,	6,605.41	
School tax and interest,	11,335.86	
Road tax,	1,701.37	
Township tax,	1,986.45	
Dog tax,	803 00	
Miscellaneous,	226.93	.50
Refunded tax,	18.21	
Insane,	109.78	1.17
County bounty orders,	4,633.33	564.73
Inquest orders,	43.55	
Paid State Treasurer,	25,645.23	
Paid state benevolent institutions,	122.51	

The Board of Commissioners of Hancock County v. Bradley.

Paid state docket fees,	6.00	
For fees, del. tax and other funds and orders redeemed,	370.39	
County asylum orders redeemed,	2,000.00	
In lieu of road receipts,	49.80	
Lost by burglary, January, 1866,	5,000.00	
	<u>\$93,026.54</u>	<u>\$1,178.34</u>
Interest on redeemed orders,	1,178.34	
Total expenditures,	94,204.88'	

"Whereas it has been shown, to the full satisfaction of the board of county commissioners of Hancock county, Indiana, by competent and sufficient evidence, that on the night of the 12th of January, A. D. 1866, the treasurer's office of this (Hancock) county was feloniously entered, the iron safe broken open, and a large sum of money stolen therefrom, of which five thousand dollars was money belonging to Hancock county, the same having been collected by Nelson Bradley, treasurer of the said county, for the year 1865 and delinquencies for former years; and,

"Whereas, it further appearing that said loss occurred without the acquiescence, negligence or fault of the said Nelson Bradley, treasurer as aforesaid; therefore,

"Be it ordered by the board aforesaid, that Nelson Bradley, treasurer of Hancock county, be, and he is hereby relieved and discharged from the payment of the said sum of five thousand dollars, so feloniously taken from the county safe as aforesaid.

"William New now protests against the release of Nelson Bradley from the payment of the five thousand dollars, the money of the county, lost by the robbing on the night of the 12th of January last, he having found no legal authority so to release him; and the board adjourned until tomorrow evening at 1 o'clock.

"ELIAS McCORD,

"WILLIAM NEW,

"JOHN HEINCHMAN.

Colman v. DeWolf.

“I, Jonathan Tague, auditor of said county of Hancock, and State aforesaid, hereby certify that the above and foregoing is a full, complete and correct copy of the records of the settlement between Nelson Bradley, as treasurer of said county, and the board of county commissioners, at the June settlement, A. D. 1866.

“Witness my name and the seal of the board of commissioners at Greenfield, this 16th day of February, A. D. 1871.

“JONATHAN TAGUE, Auditor Hancock Co.”

A demurrer to this paragraph was overruled, and the correctness of this ruling is the only question presented.

It may be conceded that the loss of the money by burglary and larceny was and is not a defence, but the settlement, allowance, discharge and release of the claim is a good defence as long as the order is in force. It was not error to overrule the demurrer.

This ruling is fully sustained by *Snelson v. The State, ex rel., etc.*, 16 Ind. 29; *Board of Comm'rs, etc., v. Saunders*, 17 Ind. 437; *Curry v. Miller*, 42 Ind. 320; *Board of Comm'rs, etc., v. Gregory*, 42 Ind. 32; *Weston v. Lumley*, 33 Ind. 486.

The judgment is affirmed, at the costs of the appellant.

Opinion filed May term, 1876; petition for a rehearing overruled November term, 1876.

COLMAN v. DEWOLF.

DESCENT.—Widow.—Effect of Statute of 1852 as to Land of Husband Theretofore Conveyed by Him Alone.—Where a husband conveyed land which he owned in fee simple, his wife not joining in the conveyance, before the taking effect of the statute of 1852, which abolished dower and gave a surviving wife an interest in fee in real estate so owned and conveyed, and said husband died after the taking effect of said statute, leaving his said wife surviving him, she was not entitled to any interest in said land.

From the Knox Circuit Court.

Colman v. DeWolf.

Cauthorn & Boyle, for appellant.

C. M. Allen, G. G. Reily, — *Johnson and DeWolf & Chambers*, for appellee.

WORDEN C. J.—This was an action by the appellant against the appellee for the partition of certain real estate in Knox county, the plaintiff claiming one-third thereof. Issue, trial by the court, finding and judgment for the defendant.

The facts in the case were agreed upon, and are, in brief, as follows:

On May 12th, 1852, Jeremiah L. Colman, then the husband of the plaintiff, was the owner of the land in fee, and on that day he conveyed the same to William Burtch, who, on December 22d, 1869, conveyed the same to the defendant. The plaintiff did not join her husband in the deed to Burtch, and her husband lived until January, 1869, when he died. The plaintiff has done no act which deprives her of whatever interest the law gives her in the land in controversy.

At the time of the conveyance of the property by the husband of the plaintiff, May 12th, 1852, she had an inchoate right of dower in the premises. But the Revised Statutes of 1852, which took effect May 6th, 1853, expressly abolished dower, but gave the surviving wife, with an exception and a proviso not necessary to be here noticed, one-third in fee of all the real estate of which her husband may have been seized in fee simple at any time during the marriage, in the conveyance of which she may not have joined, in due form of law; and also of all lands in which her husband had an equitable interest at the time of his death. 1 Rev. Stat. 1876, p. 411, sec. 16; p. 413, sec. 27.

The plaintiff in this case was not entitled to dower in the premises, because, while her dower remained inchoate, the legislature abolished dower. She was not entitled to one-third in fee, because, when the statutes of 1852 took effect, the title had passed from her husband. It was within the power of the legislature to abolish inchoate rights of dower,

Bowers *et al.* v. Bowers.

but not within its power to divest the rights of purchasers, who had, before the taking effect of the act, taken conveyances subject only to inchoate rights of dower, by giving to the surviving wife one-third of the land in fee. The plaintiff, therefore, was not entitled to any interest in the premises.

These propositions are established by numerous cases in this court, from *Noel v. Ewing*, 9 Ind. 37, down to *Taylor v. Sample*, 51 Ind. 423. Many of the cases are collected in *Bowen v. Preston*, 48 Ind. 367. We are referred to the case of *Moore v. Kent*, 37 Iowa, 20, which, upon a casual examination, might seem to conflict with some of our decisions; but upon an examination, we do not think it does. The court in that case note an important distinction between our statute and theirs. While our statute abolishes dower, theirs does not.

The judgment below is affirmed, with costs.

53	430
138	66

BOWERS ET AL. v. BOWERS.

WILL.—*Marriage.*—The rule of the common law, that the mere marriage of a man, after he has made a will, does not revoke the will, is not changed by statute in this State.

NEW TRIAL.—*Motion.*—*Evidence.*—*Instructions to Jury.*—A motion for a new trial on the ground of the admission or exclusion of evidence must point out the evidence in question; and a motion for a new trial on the ground of the giving or the refusal to give instructions to the jury must point out the instructions in question.

SAME. — *Newly-Discovered Evidence.*—A motion for a new trial, on the ground of newly-discovered evidence, was properly overruled, where it was not shown what diligence was used to discover the evidence before trial, and there was no affidavit made by a party to the action, and the newly-discovered evidence was only cumulative.

From the Miami Common Pleas Court.

Bowers et al. v. Bowers.

Shirk & Mitchell, Pettit & Taylor and Baldwin & Winfield,
for appellants.

J. L. Farrar, J. Farrar, R. P. Effinger and N. O. Ross,
for appellee.

PETTIT, J.—This suit was brought by James Bowers, the appellee, against the appellants, Mary Bowers, widow, and the heirs of George Bowers, deceased, to establish a lost will of the deceased, under our statute. 2 G. & H. 561-2.

There is an irregularity in the title of the assignment of errors. Mary Bowers, one of the defendants below, assigns errors against the plaintiff and her co-defendants. This ought not to be done, unless the co-defendants had obtained an order, judgment or decree against her, which was not the case here.

We do not think this mistake of much consequence, as the whole contest in the case was between James Bowers, the devisee, and Mary Bowers, widow of the testator; but we direct the clerk, in making his entries, to change the names of all of the appellees, except James Bowers, making them appear as appellants with Mary Bowers.

Mary Bowers alone answered the complaint:

1. By general denial.
2. That after the will was made, she married the testator, had no child by him, but that the testator revoked, burned and destroyed the will before his death.

No question is raised on the pleadings.

There was a trial by jury, and a general verdict for the plaintiff, with answers to numerous interrogatories propounded and asked by both parties, all answered, fully sustaining the general verdict.

The assignment of error only raises the question of the legality of overruling the motion for a new trial. The motion for a new trial was in these words:

“The defendants move the court for a new trial, and allege therefor the following causes, to wit:

“1. The verdict is not sustained by sufficient evidence.

“2. The verdict of the jury is contrary to law.

Bowers et al. v. Bowers.

“3. Newly-discovered evidence material for said defendants, and each of them, which they, nor either of them could, with reasonable diligence, have discovered and produced at the trial.

“4. Error of law occurring at the trial, and excepted to by said defendants and each of them. And defendants name the following particulars:

“First. That the defendants offered proper and competent evidence, which the court, on plaintiff’s objection, excluded.

“Second. The plaintiff offered improper and incompetent evidence, which the court, over said defendants’ objection, allowed and gave to the jury.

“Third. That the defendants tendered to the court proper charges, and demanded that the same be given in charge to the jury, which the court refused and excluded.

“Fourth. That the plaintiff tendered to the court charges improper to be given to the jury, which the court gave, over the objection of the defendants.

“Fifth. That the court, of its own instance, gave improper charges to the jury.”

History of the case, as shown by the record:

George Bowers, the testator, had an illegitimate son, James Bowers, and had taken, raised and provided for him, and made a will devising all of his property to him. After this will was made, George Bowers, the testator, married the appellant, Mary Bowers, by whom he had no child, and he died without legitimate issue.

It is claimed that his marriage, after making his will, revoked it.

It is admitted on both sides, and authorities are cited, that at common law, a mere marriage did not revoke a will, but that marriage and legitimate issue were necessary to revoke a will. It is claimed that our statute has changed this rule, and that a marriage after the will is made revokes it. To this view we do not agree. Our statute, 2 G. & H. 552, secs. 3, 4 and 5; sec. 19, p. 555, provides what acts shall

operate as a revocation of a will, and marriage of the testator is not one of them, and we hold that the common law on this point is not changed by statute. The fifth section cited above revokes the will of an unmarried woman, if she shall marry, but it does not apply to a man.

The evidence is long, conflicting, and, in some particulars, directly contradictory; but these were questions for the jury to determine, and say whom they would believe; and after a full and careful examination of the evidence, we think it justly and fully warranted the findings, general and special.

The reasons for a new trial for receiving and rejecting evidence, and giving and refusing instructions, are too indefinite to raise any question. They do not point out what evidence was received or rejected, nor what instructions were given or refused. Buskirk Prac., title New Trial.

The only objection made in the brief to instructions is, that the court refused to instruct that the marriage revoked the will. We have already disposed of this question.

The third reason for a new trial is newly-discovered evidence. This reason does not show or point out what diligence was used to discover the evidence before trial, nor is there any affidavit made by a party to the suit. This reason is insufficient. Buskirk Pr. 240, 241. A man by the name of Henry Ader made three affidavits under this reason, swearing in each that he was a party defendant in the suit. This is not true by the record. He was not made a party by the complaint, was not admitted as a party by the court, nor is he a party in the assignment of error, nor had he any right to be a party to the suit. He was a son of Mary Bowers, the appellant and widow of George Bowers, the testator, by a former husband, and had no legal rights in the estate of the testator. However commendable it may be for a son to protect the supposed or real rights of his mother, it will not do for him to swear that he is a party to

The State v. George.

a suit, when the record shows that he is not and ought not to be.

These affidavits talk about surprise and excusable negligence, but as there is no reason for a new trial on these grounds, these affidavits can have no force or consideration.

As to the newly-discovered evidence, the affidavits show nothing as to the diligence used to discover it, but they show that the newly-discovered evidence was cumulative only of the evidence given as to the destruction of the will.

There is no error in the record.

The judgment is affirmed, at the costs of the appellants.

Opinion filed May term, 1876; petition for a rehearing overruled November term, 1876.

53	434
166	654

THE STATE v. GEORGE.

CRIMINAL LAW.—*Previous Conviction.*—*Justice of the Peace.*—Where a person made an affidavit before a justice of the peace, charging another person, though defectively, with the commission of an assault and battery, and said justice thereupon issued a warrant for the arrest of the accused, who appeared before the justice and was thereupon tried and convicted of said offence, such conviction, remaining in force, (said justice having thus had jurisdiction of the subject-matter and of the person of the defendant) was a bar to a subsequent prosecution of said defendant on a charge of assault and battery growing out of the same act, however irregular the proceeding before said justice may have been, in that the person injured was not present at said trial, and no process was issued for him.

From the Grant Circuit Court.

C. A. Buskirk, Attorney General, and A. Moore, Prosecuting Attorney, for the State.

G. T. B. Carr, for appellee.

WORDEN, C. J.—Columbus George was indicted in the court below for an assault and battery upon the person of Joseph Bartlett, with intent to murder him, and upon trial

The State v. George.

was acquitted. The State reserved some questions of law for the decision of this court, and brings the record here for that purpose.

On the trial, the defendant offered in evidence the record of his former conviction of an assault and battery upon said Bartlett, before a justice of the peace of the county, and also the affidavit on which that conviction was founded. This evidence was objected to by the State, but the objection was overruled and exception taken.

The affidavit is as follows:

“State of Indiana, Grant county, ss:

“Before me, John G. King, a justice of the peace in and for said county, comes now Oscar George, and being first duly sworn, upon his oath says, that on or about the 7th day of November, 1875, at said county of Grant, in the State of Indiana, as affiant very believes, one Columbus George did then and there unlawfully commit an assault and battery upon the persons of George Havens and Joseph Bartlett, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana.

OSCAR GEORGE.

“Subscribed and sworn to before me, this 8th day of November, 1875.

JNO. G. KING, J. P.”

The following is the justice's record in the cause:

“State of Indiana v. Columbus George. Complaint, assault and battery. November 8th, 1875. This day came Oscar George, and files his affidavit charging the defendant with the crime of assault and battery, whereupon I issued a warrant against the defendant; and defendant appears and pleads guilty to the charge, and Oscar George and Columbus George sworn and examined as witnesses for the defendant; and after hearing all the evidence in the case, it seems to me he is guilty as charged. It is, therefore, considered by the court that the State of Indiana recover of the defendant the sum of three dollars, with costs, and all accruing costs, and that he stand committed until the fine and costs are paid or replevied.

JNO. G. KING, J. P.

The State v. George.

“November 8th, 1875, received of Columbus George, five dollars and twenty-five cents, in full of the above fine and costs. JNO. G. KING, J. P.”

It was shown by the justice, that no subpoena was issued for either Bartlett or Havens, the persons alleged to have been assaulted and beaten; nor was either of those persons present at the trial. The justice stated that he did not think that they or the deputy prosecuting attorney of Grant county knew anything about the trial, until it was over, and the State was not represented by counsel. He also stated that the offence for which the defendant was tried before him was the same as that for which he was then on trial in the circuit court.

The court charged the jury as follows:

“In this case, the defendant offers evidence to show that he has already been convicted for the same offence, or for an offence growing out of the same act for which he is now on trial. If you acquit the defendant of the felonious intent charged in the indictment, and think him guilty only of an assault and battery, you must then consider whether he has not already been once tried for that grade of offence. If he was so tried, he must be acquitted of that offence here, no matter whether the prosecuting attorney or the injured party, or either of them, had notice of said trial or not, even if the injured party was not served with process, or even if the justice of the peace trying the cause did not issue any process at all for him, or even if such injured parties or either of them had no notice whatever by process or otherwise of the pendency of the action. If no process was issued for either of the injured parties, or if none was served upon them, such omissions are those of the justice of the peace, for which the defendant can in no way be held accountable; and if he was once so tried by such justice of the peace, it was a valid trial, and a good bar to another prosecution for an offence based upon the same act.”

It is claimed by the State, that, conceding the defendant to have been innocent of the felonious intent charged, and

The State *v.* George.

therefore entitled to an acquittal thereof, the conviction of the assault and battery before the justice was no bar to the prosecution for the assault and battery charged in the indictment, conceding, also, that the two charges involved the same and no different transaction.

It is insisted, therefore, that the instruction to the jury was wrong. It is urged that the conviction before the justice was no bar, because the persons assaulted and beaten were not present as witnesses, nor was any subpoena issued for them to appear before the justice to testify as witnesses.

Whether or not the conviction before the justice was a bar to the simple assault and battery charged in the indictment, must depend upon the question whether the justice had jurisdiction of the person of the defendant in that prosecution and of the subject-matter; for if he had such jurisdiction, so that the judgment was binding upon the defendant therein, until appealed from or in some way set aside, it was doubtless a good bar to another prosecution for the same offence, however irregular the proceedings may have been before the justice.

The justice had jurisdiction of the offence of assault and battery. 2 R. S. 1876, p. 459, sec. 7; p. 669, sec. 3; p. 670, secs. 5, 7.

An act approved February 7th, 1855, 2 R. S. 1876, p. 668, provides, "that no justice of the peace shall hear or determine any complaint for assault and battery, or assault, unless the injured party be present as a witness, or having been subpoenaed refuse to attend, or unless a subpoena issued for the injured party shall have been returned 'not found' by the proper officer; and no trial shall be had upon a complaint for an affray unless some person who saw the same shall be present as a witness, or having been subpoenaed refuse to attend."

An affidavit was made before the justice, charging the defendant with the assault and battery. This gave the justice jurisdiction of the offence, and made it his duty to issue his warrant for the arrest of the defendant, which he did.

Reed v. Trentman *et al.*

Whether the defendant was actually arrested upon the warrant does not appear, but he appeared to the prosecution, and this gave the justice jurisdiction over the person of the defendant. So the justice had jurisdiction of the person and the subject-matter.

It follows that the judgment of the justice, unless appealed from or set aside, was a valid, though it may have been an erroneous judgment. It seems to us to be clear that if the justice had committed the defendant to jail in default of his paying or replevying the judgment, he would not have been a trespasser in so doing, which he would be if the judgment were void. The omission of the justice to issue a subpoena for the injured party, and entering upon the trial in his absence, were irregular, and in violation of the duty of the justice; but these irregularities did not go to his jurisdiction, or render the judgment void. We think, therefore, that the court committed no error in the charge.

The affidavit before the justice was probably bad, for charging the "assault and battery" in general terms, without setting out the acts constituting the offence. But a conviction on a bad indictment or affidavit, as long as the same remains in force, is a good bar to a subsequent prosecution for the same offence. *Fritz v. The State*, 40 Ind. 18.

There is no error in the record.

REED v. TRENTMAN ET AL.

PROMISSORY NOTE.—*Payable in Bank.*—To give the character of commercial paper to a promissory note, under sec. 6, 1 Rev. Stat. 1876, p. 636, it is not necessary that the bank in which it is made payable shall be a national bank or a chartered bank.

SAME.—*Accommodation Paper.*—*Application to Particular Purpose.*—That the application of commercial paper to a purpose other than that for which it was executed by an accommodation party may constitute a good defence thereto as to such party, he must have an interest in its application to

Reed v. Trentman *et al.*

the particular purpose for which he executed it; and in an action on a promissory note governed by the law merchant, by an indorsee against the maker, it could not constitute a good defence, that the defendant executed the note as an accommodation note only, upon an agreement between him and the payee that it should be sold to the bank at which it was payable, and not otherwise, and that the payee sold and transferred it to the plaintiff, not said bank, the plaintiff taking the assignment with knowledge of all the facts.

From the Kosciusko Circuit Court.

C. Clemans and *J. A. Clemans*, for appellant.

J. S. Frazer, *R. B. Encell*, *W. D. Frazer*, *J. A. Bitner* and *S. W. Cosand*, for appellees.

BIDDLE, J.—This action is founded on a promissory note, made by the appellant, payable to W. C. Conant, at Allen Hamilton & Co.'s Bank, Fort Wayne, Indiana, and indorsed by Conant to the appellees. A finding and judgment were had against the appellant. He appeals.

Without stating the proceedings, it is sufficient to say that the record properly presents, and the appellant discusses, but two questions:

1. The insufficiency of the complaint.

2. The sufficiency of the fourth paragraph of answer.

1. The complaint is so clearly good that we dismiss the question at once, without further notice.

2. The substantial facts stated in the fourth paragraph of the answer are as follows:

That the appellant executed said note as an accommodation note only; that, at the time, it was agreed between the appellant and the payee, that the note was to be sold to Allen Hamilton & Co., and not otherwise; that the note, when it fell due, was to be paid by the payee and delivered to the appellant; that, "in fraud of the rights of said defendant, the said Conant sold and transferred the same to said plaintiffs, they having full knowledge of the contract and agreement, and the facts in reference to said note; and in fraud of the rights of the defendant, they took the assignment of said note; and that Allen Hamilton & Co.'s bank is not a chartered or national bank, and is only

Reed v. Trentman *et al.*

a place where money is loaned; and that there was no consideration for the execution of said note, and that the plaintiffs knew it at the time they made the purchase of the same, and that the same was executed as an accommodation note only. Wherefore," etc.

It was not necessary that the bank of Allen Hamilton & Co. should have been a chartered bank or a national bank (1 Rev. Stat. 1876, 636, sec. 6), to give the character of commercial paper to the note. *Davis v. McAlpine*, 10 Ind. 137.

It is true, as Lord ELDON stated (*Smith v. Knox*, 3 Esp. 42), and as is insisted upon by appellant, that, "if a person gives a bill of exchange for a particular purpose, and that is known to the party who takes the bill; as, for example, if to answer a particular demand, then the party taking the bill cannot apply it to a different purpose; but when a bill is given under no such restriction, but merely for the accommodation of the drawer or payee, and that is sent into the world, it is no answer to an action brought on that bill, that the defendant, the acceptor, accepted it for the accommodation of the drawer, and that that fact was known to the holder;" but the "particular purpose," for which the bill is given must be such as the example given by Lord ELDON, or for some purpose in which the accommodation party has an interest in the application of the money.

While the legal rights of all parties to a bill of exchange must be protected, yet commercial paper must not be encumbered with useless or frivolous conditions. Such embarrassments would paralyze its usefulness.

We think the fourth paragraph of the answer in this case is defective, because it does not show that the appellee had any interest in the condition, or "particular purpose," that the note should be negotiated only to Allen Hamilton & Co. The condition upon which the accommodation was given, as far as the answer shows, was entirely useless, and therefore had not legal validity. *Fetters v. Muncie National Bank*, 34 Ind. 251; *Wilson v. Kinsey*, 49 Ind. 35.

The judgment is affirmed, with five per cent. damages and costs.

.

Taylor v. Elliott et al.

TAYLOR v. ELLIOTT ET AL.

53	441
140	40

SUPREME COURT.—*Appeal in Name of Deceased Party.*—*Motion to Strike Cause from Docket.*—*Motion to Substitute Name.*—The Supreme Court, having set aside its judgment of reversal in an appeal, upon the petition of the appellee, showing that the person named as appellant had died before the taking of the pretended appeal, overruled a motion to substitute as appellant the name of one to whom said deceased had in his lifetime assigned his interest as plaintiff in the cause of action, and sustained a motion of the appellee to strike the cause from the docket.

From the Marion Civil Circuit Court.

J. A. Holman, for appellant.

N. B. Taylor, *F. Rand* and *E. Taylor*, for appellees.

PERKINS, J.—A judgment was rendered in favor of Calvin A. Elliott against Quartus Taylor, in the Marion Civil Circuit Court. Afterwards, on May 1st, 1873, said Taylor departed this life. A little more than a year afterwards, viz., on the 14th day of May, 1874, he appears by the record to have appealed from the judgment against him to the Supreme Court. The Supreme Court, not taking judicial notice of the fact that Taylor was dead, and no evidence of the fact being furnished, proceeded on the supposition that he was alive, and decided the case, reversing the judgment of the Marion Civil Circuit Court. This decision was rendered in November, 1875.

Afterwards, on the 8th day of June, 1876, Elliott filed his petition in the Supreme Court, "praying that the judgment of reversal in favor of Taylor be set aside and held for nought, on the ground that he had departed this life before the apparent appeal had been taken to" the Supreme Court. This motion was sustained, on the ground that the court had no jurisdiction of the case, upon the pretended appeal.

In the opinion sustaining the motion, the court say:

"The court never acquired any jurisdiction of Taylor, he having died more than a year before the appeal was taken to this court, and the judgment in his favor would seem to have been void." *Taylor v. Elliott*, 52 Ind. 588.

Taylor v. Elliott *et al.*

If the court acquired no jurisdiction of Taylor, neither did it, under the circumstances of this case, of the appeal. And if the judgment rendered by the court on the appeal was void, it was so because the appeal was void, conferring no jurisdiction upon the court over the cause. The decision amounts to this: that no genuine appeal was ever taken; that an appeal in the name of a dead man, and apparently by him, in the absence of statutory provision, is a fiction, a nullity. In case of the death of a party after judgment, appeal must be taken, not in the name of the dead party, but by the person in whose favor the action might have been revived, if death had occurred before judgment. 2 Rev. Stat. 1876, p. 240, sec. 552.

Since the above decision was rendered, two motions have been made in the premises, and submitted to this court; the first one by Elliott, that the cause be struck from the docket; the second one by Deborah B. Taylor, that her name be substituted as appellant in the cause, in place of the name Quartus Taylor, on the ground that said Quartus, before his death, had assigned his interest in the cause of action to her.

The first motion must be sustained. No real appeal having been taken, the cause is a fiction on the docket of this court, and should be struck off.

The second motion must be overruled. No real appeal having been taken, the court never having acquired jurisdiction of the cause, the substitution of a real name in the appellate court in a fictitious appeal on the docket of that court will not convert the fictitious appeal into a real one and give the court jurisdiction of the cause. The case referred to in 46 Cal. 575, *O'Neil v. Dougherty*, is not in point.

Motion to strike cause from the docket sustained. Motion to substitute name overruled.

Gilpin v. Wilson.

GILPIN v. WILSON.

PLEADING.—Counter-Claim.—Where it appears from the facts alleged in an answer that it contains a statement of new matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the defendant, this need not also be directly averred, to constitute a counter-claim.

SAME.—Action to Recover Real Estate.—Sheriff's Sale.—Counter-Claim.—Demurrer.—Action for the recovery of the possession of real estate. Answer by way of counter-claim, seeking to quiet the defendant's title to said real estate, by setting aside a sale thereof made to the plaintiff by the sheriff under an execution issued on a judgment in favor of the plaintiff against the defendant, it being alleged that before said sale the defendant pointed out and surrendered to the officer who held said execution for collection personal property to be levied on and sold by him under the execution, of a certain value, and sufficient to satisfy the execution, which the plaintiff knew, but that said officer, confederating with the plaintiff to injure the defendant, refused and neglected to accept said personal property, and, in lieu thereof, without the knowledge or consent of the defendant, levied on and sold for a certain sum to the plaintiff the real estate in question, under said execution; that said real estate consisted of a farm of a certain number of acres; that it was susceptible of division into, etc., several portions, each of which was worth more than said sum bid by the plaintiff, and more than sufficient to satisfy said execution; but that said officer, confederating with the plaintiff as aforesaid, advertised the whole tract for sale and sold it as a whole, as aforesaid, without offering it in the subdivisions into which it was divisible as aforesaid; and the defendant offered to pay the purchase-money and ten per cent. interest thereon and all costs, or such sum as the court might find due to the plaintiff.

Held, that it was not necessary to make an exhibit of the judgment, etc., on which the sale was made.

Held, also, that the answer was good on demurrer.

Held, also, that if the facts alleged in the counter-claim might have been given in evidence under the general denial, which was also pleaded, yet the sustaining of a demurrer to the counter-claim was an available error.

EVIDENCE.—Sheriff's Return.—Evidence that on the day on which an execution was levied upon land, and before the levy was made, the execution-defendant pointed out and gave up to the officer who held the execution unincumbered personal property of a certain value, consisting of certain chattels, sufficient to satisfy the execution, which the officer refused to receive, was not evidence tending to contradict a statement in the officer's return that at a certain date the officer demanded payment of the execution defendant, and he directed the officer to levy on real

Gilpin v. Wilson.

estate, and in pursuance of said direction, on a certain date, nearly two months after the former date, he levied on certain real estate described.

From the Hamilton Circuit Court.

J. W. Evans and *R. R. Stephenson*, for appellant.

D. Moss and *F. M. Trissal*, for appellee.

PERKINS, J.—Suit by Robert L. Wilson against John Gilpin, to recover from the latter the possession of the west half of the northwest quarter of section twenty-two, in township eighteen, north, of range three, east, except ten acres off the south end of said tract.

Answer in two paragraphs:

1. The general denial.

2. "The defendant, for further answer to the plaintiff's complaint, and by way of cross-complaint against the plaintiff, says that the judgment on which the execution issued, upon which said land was sold, was rendered in the Hamilton Circuit Court, at the March term thereof, 1871, on the 17th day of March, 1871, for the sum of three hundred and forty dollars; that the same has been upon interest at six per cent. since that date; that the costs of the rendition of said judgment are taxed at eleven dollars and fifty cents; that the costs accrued since that time, in and about the issuing and levying of said execution and the sale of said land to the plaintiff, are the sum of thirty dollars; and the defendant now offers to pay the plaintiff the full amount of his said purchase-money; that is to say, the full amount that he bid the same off at said sheriff's sale, and ten per cent. interest thereon since the day of his said purchase, together with all legal costs taxed or taxable therein, if he will accept the same and surrender to the defendant his apparent legal title thereto; and in the event of the plaintiff's refusing to accept the same, the defendant asks that the court find the amount now legally due to the plaintiff by reason of his said judgment, which sum the defendant offers to pay the plaintiff, at such time as the court shall direct; because the defendant says that at the time the plaintiff caused the said lands of this

Gilpin v. Wilson.

defendant to be levied on, and previous thereto, the defendant pointed out a large amount of personal property to the deputy sheriff of said county, who was charged with the collection of said execution, and surrendered the same to said deputy sheriff, while he held said execution, to be levied upon and sold by said deputy sheriff for the purpose of fully satisfying and paying said execution and all costs thereon; that said property so turned out and given up to said deputy sheriff consisted of horses, cattle, wagons, hogs, sheep and farming utensils, of the value of more than one thousand dollars, and more than enough to fully pay off and satisfy said execution and all interest and costs thereon, all of which the plaintiff then well knew; that said deputy sheriff, combining and confederating with the plaintiff to wrong and injure the defendant, fraudulently refused and neglected to accept said personal property, but in lieu thereof, and without the defendant's knowledge or consent, levied the same on the lands in question, and sold the same to the plaintiff in said execution, the plaintiff in this suit, for the sum of four hundred and thirty-six dollars; that said lands consisted of a farm of eighty acres, which was composed of two distinct forty-acre tracts, upon each of which was situated valuable and permanent improvements; that each of said forty-acre tracts was of the value of three thousand dollars; that each of said forty-acre tracts was susceptible of being again divided into twenty-acre tracts, any one of which twenty-acre tracts would have been more than sufficient to pay the plaintiff's execution, interest and costs; but the more effectually to perpetrate their said intended fraud and injury against the defendant, the said deputy sheriff and the plaintiff, combining and confederating as aforesaid, advertised the whole of said eighty acres for sale, and sold the same as a whole to the plaintiff for the sum of four hundred and thirty-six dollars, without offering it for sale in the proper subdivisions as above averred; wherefore the defendant says that said sale was illegal and void, and said land was sold for a grossly inadequate consideration. He there-

Gilpin v. Wilson.

fore asks that said sale be set aside and held for nought; and he asks that said cloud upon his title, created by said sale, be removed, his title quieted, etc., and for all proper relief."

A demurrer to this second paragraph of answer by way of counter-claim, termed by the pleader a cross-complaint, was sustained, and exception taken.

The court erred in sustaining the demurrer to this counter-claim. It did not, it is true, by direct averment, as was the fact in the counter-claim in *Splahn v. Gillespie*, 48 Ind. 397, show that it alleged "matter arising out of, or connected with, the cause of action, which might be the subject of an action in favor of the defendant;" but this sufficiently appears from the statement of facts it contains.

It was not necessary that it should make an exhibit of the judgment, etc., on which the sheriff's sale, sought to be set aside, was made. No objection was made to the judgment.

But it is further said, that the facts alleged in the counter-claim were admissible in evidence under the general denial, and, therefore, that the defendant was not harmed by the ruling on demurrer. Suppose it to be true (as to which we here make no decision), that the facts set forth in the counter-claim were admissible under the general denial, that was not a sufficient ground on which to sustain a demurrer to it; because the facts given under the general denial could, at most, only defeat the plaintiff's suit, could only operate in defence of that suit; but that was not all the defendant wanted, nor all he might obtain by his counter-claim. By that he might obtain affirmative relief, a decree quieting his own title. The counter-claim was a direct proceeding by the defendant against the plaintiff, to set aside the sheriff's sale therein alleged. It differed from, and was more favorable to the defendant than an answer simply, in these particulars, at least:

1. Under it the defendant might have his title quieted.
2. The plaintiff, by dismissing his suit, could not take

Gilpin v. Wilson.

out of court this counter-claim, while such dismissal would carry out simple answers.

3. The counter-claim was a direct proceeding, or suit, to set aside the sheriff's sale, while a defence made under the general denial would be attacking it collaterally; and a sheriff's sale may be set aside in a direct proceeding for that purpose, where it would not be when attacked collaterally.

But we need not extend remarks on this point. See *Davis v. Campbell*, 12 Ind. 192; *Catlett v. Gilbert*, 23 Ind. 614; *Hamilton v. Burch*, 28 Ind. 233; 2 Rev. Stat. 1876, p. 185, sec. 365.

After the demurrer was sustained to the counter-claim, the cause was tried upon the general denial; judgment for the plaintiff, motion for a new trial overruled, exception, and appeal.

On this trial, some rulings were made and excepted to as erroneous. The following is one of them. After the plaintiff had given in evidence the judgment and execution, by virtue of which the sale of the land was made, and the sheriff's return upon the execution, the defendant offered to prove that, on the day, and before the levy was made on his land, he pointed out and gave up to the deputy sheriff, who then held the execution, unincumbered personal property of the value of one thousand dollars, consisting of hogs, horses, etc., sufficient to satisfy said execution and all costs, etc., which the deputy sheriff refused to receive, etc. It was objected to this testimony, that it was inadmissible, because it would contradict the sheriff's return, and the objection was sustained by the court. The part of the return which it was supposed the testimony would contradict is as follows:

"This writ came to hand September 18th, 1871, at three o'clock P. M., and on the 30th of September, I demanded payment of defendant, John Gilpin, and said defendant directed me to levy on real estate; and in pursuance of said direction, on the 22d of November, 1871, I levied on the following," etc., the property involved in this suit.

Gilpin v. Wilson.

The return states that, on the 30th of September, the defendant directed the sheriff "to levy on real estate," and that on the 22d of November following, nearly two months after the alleged direction to so levy, he did levy on real estate.

The testimony offered by the defendant and rejected was, that on the 22d of November, before the levy on real estate was made, he, the defendant, offered to, and did turn out to the sheriff sufficient unincumbered personal property, etc. There was nothing in the return of the sheriff on this point; the testimony offered and rejected did not tend to contradict any statement in it, and the testimony should have been admitted. *Davis v. Campbell, supra.*

What we decide here is, that the testimony did not tend to contradict the sheriff's return, and that the objection to it, on the ground that it did, should not have been sustained. It is proper that we should observe, in order to exclude any inference to that effect, that we do not mean to be understood as intimating that the statement in the sheriff's return, that the defendant directed him to levy on real estate, might not have been contradicted in the trial of this cause. If it was not a proper or material part of the return, it might have been. *Goodtitle v. Cummins*, 8 Blackf. 179. Whether it was such, and, if it was, under what circumstances and in what cases it could be contradicted by parol evidence, we have not examined.

See, as to contradiction of a sheriff's return, *Goodtitle v. Cummins, supra*; *Gregg v. Strange*, 3 Ind. 366; *Butler v. The State, ex rel., etc.*, 20 Ind. 169; *Splahn v. Gillespie, supra.*

The judgment is reversed, with costs; cause remanded for another trial, and for further proceedings.

 Gregory v. Latchem et al.

GREGORY v. LATCHEM ET AL.

53	449
146	594

EXECUTION.—*Exemption of Property from Sale.*—*Inventory.*—*Evidence.*—An execution-defendant, who demanded the exemption of certain articles from sale under the execution, presented to the officer holding the execution, before sale, an inventory purporting therein to be “an inventory of,” etc., following the language of section 1 of the act of March 5th, 1859, as amended in 1861, 2 Rev. Stat. 1876, p. 352, except the omission of the words “within or without this State,” and the commas before and after them, after the words “real estate;” and the affidavit attached thereto, made and subscribed by the execution-defendant, stated that “the foregoing inventory” contained “a full and true account of all the property held by him on,” etc., the date of the issuing of the execution, and that none of said property had been since disposed of, except, etc., showing how certain articles mentioned in the inventory had been disposed of, and what disposition had been made of the proceeds.

Held, that the inventory was sufficient, and constituted material evidence to sustain an action by the execution-defendant against said officer and the execution-plaintiff, to recover possession of articles sold by the officer to the execution-plaintiff under said execution, in disregard of the execution-defendant’s demand for their exemption from such sale.

SAME.—*Constitutional Law.*—*Construction of Exemption Statutes and Proceedings.*—Statutes to carry into effect the provision of the constitution, that “the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property,” etc., and proceedings in carrying such statutes out practically, should be liberally construed.

From the Huntington Circuit Court.

W. D. Cole, B. F. Ibach and C. W. Fairbanks, for appellant.

PERKINS, J.—Action against the sheriff and an execution-plaintiff to recover personal property. The action is by the execution-defendant, and, as to a part of the property sued for, he claims it was wrongfully and illegally sold by the sheriff to the execution-plaintiff in disregard of a valid claim made by him for its exemption from sale. As to the balance of the property sued for, the execution-defendant, the plaintiff in this suit, claims that it was wrongfully and illegally sold, because he had given a delivery bond for the

Gregory v. Latchem *et al.*

property, and had tendered its value to the sheriff in money in lieu of the property. Judgment below for defendants; motion for a new trial overruled; exception; appeal, etc.

1. As to the portion of the property claimed as exempt from execution, the statute, 2 R. S. 1876, p. 352, requires, "that before any person shall be entitled to the benefit of the provisions of the above recited act, he shall make out and deliver to the sheriff or other officer having the writ, an inventory of all of his or her real estate, within or without this State, money on hand or on deposit within or without this State, rights, credits and choses in action, and all personal property of every description whatever belonging to him or [in] which he had any interest at the date of the issuing of the writ, and make and subscribe an affidavit to the same that such inventory contains a full and true account of all such property as required in this act to be set out in the said inventory, had or held by him at the time such writ was issued, and if any such property has been disposed of by him since the issuing of the writ, such affidavit shall show that fact, and how the same has been disposed of, and what disposition he has made of the proceeds, and until such inventory and affidavit shall be furnished to such officer, he shall not set apart any property to the execution-defendant as exempt from execution."

On the trial of this cause below, the plaintiff testified that the following inventory was delivered to the sheriff before the sale, accompanied by a demand for the exemption of certain articles, etc., with which the sheriff refused to comply :

"An inventory of all the real estate money on hand or on deposit within or without this State, rights, credits, and choses in action, and all personal property of every description whatever belonging to James G. Gregory, or in which he had any interest whatever on the 16th day of October, 1873, viz., bill against P. H. Burkhead; bill against E. C. Briant; four mules, use of till August 1st, 1874; three sets double harness, use of two sets till August 1st, 1874; two

Gregory v. Latchem *et al.*

two-horse wagons, use of till August 1st, 1874; three axes; one buck saw; fifteen bushels of corn; two hundred pounds of hay; four fly nets; ten shares of stock in H., B., L. & S. Association; one small engine; two horse-brushes; two curry combs; watch; four cords of wood; one rubber overcoat; bill against F. Kopp; three whips; one riding bridle; one spade; one hoe; two frows; four wedges; two log bolsters; one double sleigh, use of till August 1st, 1874; three wood racks.

“State of Indiana, Huntington county, ss:

“The undersigned, being duly sworn, says, that the foregoing inventory contains a full and true account of all the property held by him on the 16th day of October, 1873, and that none of said property has since been disposed of, except the bill against Burkhead, the bill against Briant, the bill against Fred. Kopp, the corn and hay, part of the four cords of wood. The bills of Burkhead, Briant and Kopp were collected and paid out in part on notes and debts to William Foust, Henry Pohler, D. Youngling, L. Severance, J. Fernandez, Hiram France, and balance was used for living expenses. The hay and corn were fed to the mules and horses; part of the wood has been used by his family. The double sleigh, four mules, two sets of double harness, two two-horse wagons, are incumbered by a mortgage to Borum & Pease, of New York City, made on the 10th of October, 1873.

JAMES G. GREGORY.

“Sworn to and subscribed before me, this 17th day of November, 1873.

T. L. LUCAS, Clerk.”

The plaintiff, the only witness in the cause, so far as appears by the bill of exceptions, testified that the execution was levied on the property in controversy on the 16th of October, 1873; that he, the plaintiff, was a resident householder; that before the sale, he designated to the sheriff articles claimed by him as exempt from execution, which were appraised at two hundred eighty-one dollars and sixty-five cents; that the judgment upon which the execution issued was rendered upon a demand on contract, not for a tort.

Gregory v. Latchem *et al.*

The bill of exceptions proceeds: "The plaintiff then offered in evidence the inventory of all his property, filed by him to obtain exemption, which inventory is in the following words, to wit," (the inventory copied above in this opinion); "to the admission of which the defendants objected, the court sustained the objection, and the plaintiff excepted."

Did the court err in rejecting the inventory? The record does not disclose to us the ground on which it was rejected, and the counsel for the defendants, on whose objection it was rejected, have not favored the court with a brief in vindication of the ruling of the court.

It was material and absolutely necessary to the plaintiff's success, under the issues in the cause, that a verified inventory of all the plaintiff's property, made before sale by the sheriff, should be given in evidence, or its contents, if lost. Does the inventory offered and excluded appear to be such an one? We think it does. It commences by stating that it is "an inventory of all the real estate money on hand or on deposit within or without this State, rights, credits," etc., following the language of the statute. The only deviation from it is in omitting the words "within or without this State," after the words "real estate;" but it omits the commas in the statute before and after the omitted words, so as to fairly make those words used after the words "on deposit" apply to the words "real estate," as well as to money on hand, etc. The statement in the inventory clearly covers all the plaintiff's property, wherever existing, and the affidavit in verification avers that that inventory "contains a full and true account of all the property held by him," etc.; not simply that the list of property therein is correct, but the "account" given in it of the property is true, which includes the statement in regard to its situation, as well as to the items in it.

We think the affidavit in verification extended to all the statement in the paper termed an inventory. The jurat is sufficient. See *Hosea v. The State*, 47 Ind. 180, and cases cited.

The constitution of the State declares, that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property," etc.; and in view of the object of this humane provision, we think statutes to carry it into effect and proceedings in carrying them out practically should be liberally construed.

The error in excluding the inventory as evidence was a material one, for which the judgment must be reversed.

Under the statute of 1852, the execution defendant had but one thing to do to entitle him to have property set apart as exempt from execution; that was, to claim particular items of property, so that the proper person might schedule it for appraisement. This claim might be made by parol or in writing. *Mark v. The State, ex rel., etc.*, 15 Ind. 98. As to the mode and manner of making this claim, the statute of 1852 has not been changed. 2 Rev. Stat. 1876, pp. 354, 355. But, by the act of 1859, amended in 1861 (2 Rev. Stat. 1876, p. 352), an additional act is required to be performed by an execution-defendant, as a condition precedent to his right to require the sheriff to set off to him property as exempt, etc., and that act is, the furnishing to the sheriff a verified inventory of all the property he owns, or has an interest in, anywhere in the world. This is a distinct act from his claiming by designation of particular items of property for exemption; but until it is performed, the sheriff cannot "set apart any property to the execution defendant as exempt from execution," on any claim, by designation of items, that he may make. 2 Rev. Stat. 1876, p. 352.

The rejection of the schedule offered in evidence in this case was, therefore, utterly fatal to the plaintiff's right of recovery.

One other point may be noticed. It relates to the second portion of the property above mentioned, sought to be recovered in this suit. As to this, the court instructed the jury:

"The other portion of the property consists of four brown mules, one two-horse wagon, one set of double harness, and

The Grover & Baker Sewing Machine Co. v. Butler.

one sleigh. If this were levied on as alleged, appraised, a delivery-bond executed, and the property retained in the possession of Gregory, the plaintiff, and the same was subsequently, before its being again taken possession of and sold by the sheriff, sold by the plaintiff to Frederick Schonell for the appraised value thereof, or more, the price being less than fifty dollars, this would pass the property in the goods to Schonell, and no right of action, therefore, would remain in the plaintiff; and our statute requiring the action to be brought in the name of the real party in interest, the plaintiff, Gregory, in such case would not be entitled to recover as to this portion of the property; and if a part only of it were sold to Schonell, and a part of it remained unsold, the sheriff would have had the right to take possession of the part remaining unsold, and subject the interest therein of the plaintiff to sale on the execution."

We think this instruction is unobjectionable. It presents a hypothetical case properly to the jury, and states the law correctly, if they find the facts to correspond to the hypothesis.

The judgment is reversed, with costs; cause remanded for further proceedings, etc

THE GROVER & BAKER SEWING MACHINE CO. v. BUTLER.

PATENT.—*State Legislation.*—No state legislation should be so construed as to interfere with the enjoyment of property in inventions, as secured by letters-patent of the United States, or to annex conditions to such a grant.

SAME.—*Act Respecting Foreign Corporations and their Agents.*—The provisions of the act "respecting foreign corporations and their agents in this State" (1 Rev. Stat. 1876, p. 373) do not apply to a foreign corporation which is the owner, either as patentee or as assignee, of letters-patent issued by the United States, or to its agents in this State, in its transactions in this State, connected with the manufacture, use or sale of the invention described in such letters-patent.

The Grover & Baker Sewing Machine Co. v. Butler.

From the Newton Circuit Court.

Troxell, Ward & Graham, for appellant.

Howk, J.—This is an action by appellant, the payee, against appellee, the maker of a promissory note. Appellee's answer states, in substance, that appellant is a foreign corporation, not organized under the laws of this State; that the note sued upon was executed to appellant in Newton County, Indiana, in consideration of a sewing-machine, sold to appellee by one J. F. Kitsmiller, who represented himself a duly authorized agent of the appellant in said county, and that said Kitsmiller did not deposit in the office of the clerk of said Newton County any power of attorney or other authority from appellant, authorizing said Kitsmiller to transact business in said county in appellant's name, and authorizing service of process on appellant, by service on said Kitsmiller, in said county.

To this answer appellant demurred, upon the ground that it did not state facts sufficient to constitute a defence to the action. The demurrer was overruled, and appellant excepted.

Appellant then replied specially to the answer, that the sewing-machine, sold by appellant to appellee, as alleged in the answer, and for which the note in suit was executed, was an article or implement, the sole and exclusive right and privilege of the manufacture and sale of which were, prior to and at the time of said sale thereof, vested in appellant by virtue of certain letters-patent, issued by the government of the United States of America, on the 22d day of June, 1852, to William O. Grover and William E. Baker, and re-issued on the 6th day of July, 1858, by said United States, to the appellant, and extended by said United States on the 21st day of June, 1866, for seven years from that time, and by virtue also of the assignment to appellant, by said Grover & Baker, of their right, title, interest, claim and demand in, to and under said letters-patent, and the re-issue and extension thereof. Copies of the re-issued let-

The Grover & Baker Sewing Machine Co. *v.* Butler.

ters-patent, and of the extension thereof, and of said assignment, are filed with and made part of said reply. And appellant then averred in said reply, that the sewing-machine, in said answer mentioned, was manufactured and sold to appellee by the appellant, pursuant to the authority and under and by virtue of the franchise vested in and secured to appellant in manner and form aforesaid, and not otherwise.

To this reply appellee demurred, upon the ground that it did not state facts sufficient to constitute a reply to appellee's answer. This demurrer was sustained by the court below, and to this decision appellant excepted. And appellant refusing to amend its reply, judgment was rendered for the appellee, upon his demurrer.

In this court, the appellant has assigned the following errors, on the record:

1. The overruling of appellant's demurrer to appellee's answer.

2. The sustaining of appellee's demurrer to appellant's reply to the answer.

The first alleged error was intended, we suppose, to present to this court, for its consideration, the sufficiency of the facts stated in appellee's answer to constitute a defence to this action. As, however, the appellant's attorneys, in their brief on file in this cause, have completely ignored this first alleged error, we shall, in conformity with the well established practice of this court, regard this error as waived by the appellant, and will neither consider nor decide any question thereby presented, or intended to be presented, for our determination.

A more interesting question, however, is presented for the consideration of this court, by the alleged error assigned upon the ruling of the court below on appellee's demurrer to appellant's reply to the answer. In this reply, appellant virtually admitted the facts stated in appellee's answer to be true; and in avoidance of the legal conclusion heretofore considered as resulting from those facts, the appellant then

The Grover & Baker Sewing Machine Co. v. Butler.

stated, in substance, that, by virtue of certain letters-patent, issued by the government of the United States to William O. Grover and William E. Baker, and of their assignment of their right, title, interest, claim and demand in, to and under said letters-patent to the appellant, and of the re-issue and the extension of said letters-patent by the United States to the appellant, the exclusive right and privilege to manufacture and sell the sewing-machines, the sale of one of which machines was the consideration of the note in suit, was vested in the appellant, prior to and at the time of the sale to appellee. And then it is averred in the reply, that the sewing-machine, mentioned in appellee's answer, was manufactured and sold by appellant to appellee, pursuant to the authority, and under and by virtue of the franchise vested in and secured to appellant in manner and form aforesaid, and not otherwise.

The act respecting foreign corporations and their agents in this State is broad and comprehensive in its terms, and contains no exceptions. It has been recognized by this court as a valid law. But can it be held to apply to this case, as the same is made by the averments in appellant's reply? In this State, it is conceded that the constitution of the United States and the acts of Congress pursuant thereto and in conformity therewith are the supreme law of the land. In so far, therefore, as an act of the general assembly of this State is in conflict with this supreme law of the land, that far forth, at least, the act of the state legislature is inoperative and of no binding force.

Section 8 of the first article of the constitution of the United States provides, that "the Congress shall have power," *inter alia*, "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." 1 R. S. 1876, pp. 5, 6. The power thus vested in Congress is not expressly an exclusive power, but practically it has been so regarded and acted upon, since the adoption of the constitution. Under this power, Congress has legislated

The Grover & Baker Sewing Machine Co. v. Butler.

from time to time, as it was deemed advisable, since the organization of the government. Under this legislation it has generally been provided that the letters-patent, issued in conformity therewith, should contain, among other things, a grant to the patentee, his heirs or assigns, for a specified and limited time, of the exclusive right to make, use and vend the invention or discovery, throughout the United States and territories thereof. To this effect is the language used in section 4,884, of the Revised Statutes of the United States, page 953; and in this respect the language there used does not differ materially from the language used in previous legislation by Congress on the same subject. In the case now under consideration, the letters-patent, re-issued to appellant, a copy of which is filed with and made part of the reply, contain a grant to appellant, its successors or assigns, for a limited time, of "the full and exclusive right and liberty of making, constructing, using and vending to others to be used" the improved sewing-machine mentioned therein. In the reply, it is averred that the appellant, under and by virtue of the right and liberty granted in its letters-patent, and the extension thereof, and pursuant thereto, had manufactured and sold to the appellee the sewing-machine mentioned in his answer, in consideration of which sale both parties admit that the note in suit was executed.

If the facts stated in the reply are true, and, if well pleaded, their truth is admitted by appellee's demurrer to the reply, then at the time of the sale of the sewing-machine to appellee, and at the time of the execution of the note sued upon, the appellant undoubtedly held, under the constitution of the United States and the acts of Congress pursuant thereto, the full and exclusive right to make, use and vend, in this State, the sewing-machines mentioned in its letters-patent. Now, the question arises, was that right, so held by appellant, a foreign corporation, affected in any manner by the provisions and requirements of the law of this State,

The Grover & Baker Sewing Machine Co. v. Butler.

before mentioned, respecting foreign corporations, and their agents in this State?

Upon this question we have not been able to find any reported case which is directly in point. *Ex parte Robinson*, 2 Bissell, 309, was a decision of the U. S. Circuit Court, for the District of Indiana, upon a statute of this State, the object of which, as expressed in its title, was "to regulate the sale of patent-rights, and to prevent frauds in connection therewith," 3 Ind. Stat. 364. In that case, DAVIS, J., in rendering the decision, used this language: "The property in inventions exists by virtue of the laws of Congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property. If this were not so, it is easy to see that a state could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress, which regulate its transfer, and destroy the power conferred upon Congress by the constitution."

In *Helm v. The First National Bank of Huntington*, 43 Ind. 167, the language of DAVIS, J., just recited, is quoted by BUSKIRK, J., in his opinion, with approval. In this latter case, this court held that the statute of this State, entitled, "An act to regulate the sale of patent-rights, and to prevent frauds in connection therewith," *supra*, which became a law, without the approval of the governor, on the 23d day of April, 1869, was unconstitutional and void. The doctrine of this case, as we construe it, is, that no state has a right to interfere by legislation with the enjoyment of property in inventions, as secured by letters-patent of the United States, or to annex conditions to the grant; and the conclusion we deduce from this doctrine is, that none of the legislation of this State should be so construed as to interfere with the enjoyment of such property, or to annex conditions to such a grant. Where a foreign corporation is the owner, either as patentee or

Grose v. Dickerson.

assignee, of letters-patent issued by the United States, and the transactions of such corporation, in this State, are connected with the manufacture, use, or sale of the invention described in such letters-patent, we hold that the provisions and requirements of the act of this State entitled, "An act respecting foreign corporations and their agents in this State," approved June 17th, 1852, 1 Rev. Stat. 1876, p. 373, do not apply to such foreign corporation, or its agents in this State, in such transactions in this State.

It follows, therefore, that the court below erred in sustaining appellee's demurrer to the reply.

The judgment is reversed, at the costs of appellee, and cause remanded, with instructions to the court below to overrule the demurrer to the reply, and for other proceedings.

GROSE v. DICKERSON.

PLEADING.—Demurrer.—Form of Action.—If a complaint states any cause of action in favor of the plaintiff against the defendant, it will be held good on demurrer assigning want of sufficient facts, without regard to the question as to what the form of action would have been at common law.

SAME.—Demurrer.—General Denial.—There can be no available error in sustaining a demurrer to a paragraph of answer, where every purpose it could accomplish is served by a remaining paragraph of general denial.

SAME.—Set-Off.—Tort.—An answer of set-off pleaded to a complaint in tort is bad on demurrer.

SAME.—Demurrer.—Waiver.—Where a plaintiff replies to a paragraph of answer, after the sustaining of a demurrer thereto filed by him, and, the demurrer being thus waived, the defendant has the full benefit of such paragraph, he cannot complain of the ruling on the demurrer.

NEW TRIAL.—Motion.—A motion for a new trial on the ground of irregularities upon the trial must distinctly specify the particular irregularities complained of.

From the Henry Circuit Court.

Grose v. Dickerson.

W. Grose and A. M. Grose, for appellant.

Chambers & Saint, for appellee.

DOWNEY, C. J.—Action by the appellee against the appellant. The complaint consists of three paragraphs.

In the first, it is alleged, in substance, that on the 1st day of October, 1874, at Henry county, etc., the defendant wrongfully entered upon the plaintiff's land, described in the paragraph, situated in that county, and pulled off fourteen acres of corn, and dug up twenty bushels of potatoes, belonging to the plaintiff, and carried the same away and converted and disposed of the same to his own use, to the plaintiff's damage one hundred and seventy dollars.

The second paragraph alleges, that, on the 30th day of September, 1874, the plaintiff was the owner of fourteen acres of corn of the value of two hundred dollars, and one-quarter of an acre of potatoes of the value of twenty dollars, all growing on the said land; that on that day the defendant, without permission of the plaintiff, unlawfully and with force and arms, seized and carried away and converted to his own use and annihilated said corn and potatoes, to the damage of said plaintiff two hundred and twenty dollars.

The third paragraph alleges that the plaintiff and defendant were the joint owners of the same quantities of corn and potatoes, growing on said land, of the same value, and the defendant, without permission of the plaintiff, seized, pulled off and carried away and converted to his own use, and totally destroyed all of said corn and potatoes, etc.

The defendant demurred separately to the second and third paragraphs of the complaint, and his demurrers were overruled.

He then answered in nine paragraphs, the first of which was a general denial. The plaintiff demurred separately to each paragraph of the answer, except the first.

The demurrer was sustained to the second, fourth, sixth and seventh, and overruled as to the third, fifth and eighth. No action seems to have been taken upon the demurrer, as to the ninth.

Grose v. Dickerson.

The plaintiff replied to the third, fifth, seventh, eighth and ninth paragraphs of the answer, in two paragraphs, the first of which was the general denial; and also filed a further reply to the third, fifth, sixth and eighth paragraphs of the answer in denial thereof.

It thus appears that there was a reply to the sixth and seventh paragraphs of the answer, after demurrers had been sustained to them.

The defendant demurred to the second paragraph of the reply, and his demurrer was overruled. A trial by jury resulted in a verdict for the plaintiff for forty-one dollars and sixty cents, on which judgment was rendered. Afterwards, during the term, the defendant moved the court to grant a new trial in the cause, but the motion was overruled.

The following errors are assigned:

1. Overruling the demurrer to the second paragraph of the complaint.
2. Overruling the demurrer to the third paragraph of the complaint.
3. Sustaining the demurrer to the second paragraph of the answer.
4. Sustaining the demurrer to the fourth paragraph of the answer.
5. Sustaining the demurrer to the sixth paragraph of the answer.
6. Sustaining the demurrer to the seventh paragraph of the answer.
7. Overruling the motion for a new trial.
8. Overruling the demurrer to the second paragraph of the reply.

Other errors are alleged, but they are only reasons for a new trial, and claim no further notice here.

1 and 2. We think each of the paragraphs of the complaint contains a good cause of action. Whether the cause of action stated would have been trespass *quare clausum fregit*, or trover and conversion, or some other form of action at common law, we need not inquire, as the demur-

Grose v. Dickerson.

ers were properly overruled if there was any cause of action stated.

3. The second paragraph of the answer alleges, that the land mentioned was the soil and land of the defendant at the time of the entry, etc., wherefore, etc.

The appellant cannot justly complain of the action of the court in sustaining the demurrer to this paragraph of the answer, since every purpose it could accomplish was served by the general denial.

4. In the fourth paragraph of the answer, which was to the second and third paragraphs of the complaint, the defendant denied that he destroyed or annihilated the corn and potatoes as alleged, and claimed that before the commencement of the action the plaintiff was indebted to him in the sum of three hundred dollars, on account filed, and asked to set the same off, etc.

As the action was in tort, the set-off was inadmissible. 2 R. S. 1876, p. 62, sec. 57.

5. The sixth paragraph of the answer sets up a contract between the plaintiff and the defendant, by which the plaintiff was to reside in a dwelling-house on the land, then and still owned by the defendant, and till the said corn-ground and fields in corn for the defendant, the plaintiff to have two-fifths and the defendant three-fifths thereof; the plaintiff to gather said corn in the fall, the defendant to furnish a hand to help gather the part belonging to the defendant, at the proper time for gathering corn; that the plaintiff failed and refused to fulfil his contract pertaining to said corn and his residence on said land; and, on the 20th day of July, 1874, he abandoned the premises and removed therefrom, leaving the possession thereof to the defendant; that the plaintiff never had any authority, whatever, to have or raise any potatoes upon said land.

We cannot think this a good defence to the action. It does not show a sufficient reason why the defendant should take and convert to his own use the corn and potatoes raised, denying the plaintiff any right therein. In addition

Grose v. Dickerson.

to this, it must be borne in mind that the plaintiff replied to this paragraph of the answer, and in that way the defendant had the full benefit of it, as much as if the demurrer had been overruled.

This is so as to the seventh paragraph, also. *Gordon v. Culbertson*, 51 Ind. 334.

6. The seventh paragraph of the answer alleged, that the plaintiff was the tenant of the defendant, on said land, for the year 1874, under a certain and special contract for said year; that the plaintiff failed and refused to perform his part of said contract, and on the 20th day of July, 1874, abandoned and removed from said lands, then and there leaving the possession thereof to the defendant.

We think the court committed no error in holding this paragraph of the answer bad. It clearly contains no defence to the action.

7. We are next to consider the reasons for a new trial, and here it may be remarked that counsel for appellant discuss the instructions which were given and others that were refused; but, as will be seen, these questions are not presented in the motion for a new trial.

The causes for a new trial, in the motion, are as follows:

1. Irregularity in the proceedings of the court upon the trial, by which the defendant was prevented from having a fair trial.

2. Because the damages returned are excessive.

3. Because the verdict is not sustained by sufficient evidence.

4. Because the verdict is contrary to law.

5. For and because of error of law occurring at and upon the trial of said cause, and excepted to by the defendant at the time.

When irregularities upon the trial are complained of, the particular irregularities must be distinctly specified in the motion for a new trial.

We cannot say that the court erred in refusing a new trial for the second, third or fourth causes assigned in the motion.

Grose v. Dickerson.

8. We see no reason for reversing the judgment on account of the ruling of the court on the demurrer to the second paragraph of the reply. The second paragraph was probably unnecessary, but it contained a denial of material allegations in the paragraphs of the answer to which it was pleaded, and a reassertion of material matter of the complaint. It was not a departure from the complaint.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

Howk, J.—The only reason assigned by appellant for a rehearing of this cause is thus stated in the petition:

“The court, in opinion delivered, does not seem to have considered the question of who was in actual possession of the premises at the time of the alleged trespass.”

As the issues were made up and submitted to the jury, we do not consider the question of the possession of the premises as of any material importance. There were three paragraphs in the complaint. The first paragraph charged trespass *quare clausum fregit*; the second paragraph was silent on the subject of the ownership or possession of the *locus in quo*, but averred that appellee was the owner of fourteen acres of corn, and of twenty bushels of potatoes, growing thereon, and that appellant, with force and arms, wrongfully pulled the corn and dug the potatoes, and converted the same to his own use; and the third paragraph was also silent as to the ownership or possession of the land, but alleged a joint ownership with appellant of fourteen acres of corn, and one-fourth of an acre of potatoes, growing on the land, and that the appellant, with force and arms, wrongfully pulled the corn and dug the potatoes, and converted the same to his own use.

Upon each of these paragraphs issues were made, and these issues were all submitted to the jury, and a general verdict was returned thereon. In such case, we are unable to see how “the question of who was in the actual possession

McCormack v. The First National Bank of Greensburgh *et al.*

of the premises" becomes material, or can change the decision of this court heretofore rendered in this cause.

The petition for a rehearing is therefore overruled.

McCORMACK v. THE FIRST NATIONAL BANK OF GREENSBURGH ET AL.

JURISDICTION.—*Of Person.*—*Appearance.*—Jurisdiction of the person of a defendant in a civil action can only be acquired by the issuing of summons and the service thereof in one of the modes provided by statute, or by his voluntary appearance in court in person or by attorney and submission to the authority of the court. An appearance is a proceeding in court, and must constitute a part of the record of the cause in which it is entered.

SAME.—*Indorsement on Complaint.*—*Review of Judgment.*—Upon the back of a complaint, in an action of ordinary adversary character, filed in term, was indorsed the following, signed by the defendants in vacation: "We hereby enter an appearance to the foregoing action, and waive the issuing and service of process."

Held, that this did not amount to an appearance of said defendants, and, no summons having been issued, and one of said defendants not having appeared in court in person or by attorney, the court had no jurisdiction of the person of such defendant, and a proceeding to review a personal judgment rendered against him upon said complaint would lie in his behalf, without his having taken an exception to any ruling in the original action.

From the Decatur Circuit Court.

S. A. Bonner, J. L. Bracken and J. D. Miller, for appellant.

B. W. Wilson, for appellees.

BUSKIRK, J.—The appellee The Cincinnati & Terre Haute Railway Company, on the 10th of October, 1872, executed to the appellant the following instrument.

53	466
196	159
53	466
141	163
53	466
159	643

McCormack v. The First National Bank of Greensburgh *et al.*

“\$3,799.91. TERRE HAUTE, IND., Oct. 10th, 1872.

“At thirty days sight, pay to the order of D. B. McCormack, Esq., three thousand seven hundred and ninety-nine dollars and ninety-one cents; value received, without any relief from valuation or appraisement laws, and charge the same to account of M. P. WOOD, Gen'l Sup't C. & T. H. Ry. Co.

“To A. PLEASANTON, Pres't C. & T. H. Ry., 98 Broadway, New York.”

Upon the face of which appears the following:

“Accepted, Oct. 14th, 1872.

“Cincinnati & Terre Haute Railway,

“By A. PLEASANTON, President.”

The appellant negotiated the above draft with the appellee The First National Bank of Greensburgh, and indorsed his name on the back thereof.

The draft was not paid at maturity, but was duly protested for non-payment. At the April term, 1873, of the Decatur Circuit Court, The First National Bank obtained a judgment against the appellant and the Cincinnati & Terre Haute Railway Company, for the sum of four thousand one hundred and twenty-four dollars and seventy-two cents, upon the above draft.

The purpose of the present action by the appellant is to obtain a review and reversal of said judgment, so far as it affects him.

The first and principal ground upon which the review is asked is, that the court below possessed no power to render the judgment against him at the time and in the manner in which it was done.

It appears from a copy of the record in the original action, filed with and made a part of the complaint in the present action, that, at the April term, 1873, of the Decatur Circuit Court, The First National Bank of Greensburgh, by her attorney, filed in said court a complaint in the name of said bank and against the appellant and the other appellee, the railway company, based upon said draft; that upon the back of said complaint was entered the following agreement:

McCormack v. The First National Bank of Greensburgh *et al.*

"We hereby enter an appearance to the foregoing action and waive the issuing and service of process.

"D. B. McCORMACK.

"Cincinnati & Terre Haute Ry.,

"By GEO. E. BALDWIN, Div. Eng. and Ag't."

The record in said cause then proceeds:

"Whereupon defendants are ruled to answer, and failing to do so, said rule is now closed and made final; and this cause being submitted for trial, the court finds that there is due the plaintiff, upon the bill of exchange exhibited in the complaint, the sum of four thousand one hundred and twenty-four dollars and seventy-two cents."

Then follows a judgment for said sum. It is alleged, in the complaint seeking the review of said judgment, that appellant had, prior to his signing said agreement consenting to appear to said action, employed Bonner & Bracken, Esqrs., regular-practicing attorneys of said court, to make a defence to said action; that when the said complaint was filed in court, and judgment rendered thereon, he was necessarily absent from said county, and his said attorneys were temporarily absent from the court-house. The court below sustained demurrers to both paragraphs of the complaint, and this ruling is assigned for error, and presents the only questions for our decision.

Two positions are assumed by counsel for appellant. First, that the agreement entered upon the complaint is unauthorized by the statute, and conferred no jurisdiction on the court over the person of the appellant,

Second, that conceding that the court had acquired jurisdiction of the appellant, it possessed no power to enter a rule against him to answer, without his personal appearance in court or by attorney; and that the court had no power to close the rule on that day, but that he should have been ruled to answer on the next day, or next regular calling of said cause, after the same was entered upon the docket.

Counsel for the bank insists that there is no question pre-

McCormack v. The First National Bank of Greensburgh *et al.*

sented for decision, for the reason that the judgment was rendered upon the appearance of the appellant, and that there was no exception taken to any ruling of the court.

The failure of a party, who is legally in court in person or by attorney, to except to the ruling of the court, is a waiver of such error, and a bill of review cannot be used as a means of creating an exception in the first instance. *Train v. Gridley*, 36 Ind. 241; *Richardson v. Howk*, 45 Ind. 451; *Berkshire v. Young*, 45 Ind. 461; *Preston v. Sandford's Adm'r*, 21 Ind. 156.

It therefore becomes necessary to inquire whether the appellant was in court at the time the judgment was rendered against him. It is agreed that he was not personally in court, and that he did not appear by attorney.

The real question is, did his agreement entered on the complaint amount to an appearance to the action? If it did not, he had no legal notice of the action, and the proceedings were null and void.

It is firmly settled by repeated decisions of this court, that a judgment of a court, in a suit requiring ordinary adversary proceedings, which appears upon its face to have been rendered without jurisdiction having been acquired of the person of the defendant or without jurisdiction of the subject-matter, is void, and may be so treated when it comes in question collaterally. *Horner v. Doe*, 1 Ind. 130; *Buskirk's Table of Cases*, 83, and the cases there cited.

In the action sought to be reviewed there was no summons issued. There was no appearance by the defendant, either in person or by attorney.

The only attempt to notify the defendants was by the agreement entered on the complaint, and which elsewhere appears in this opinion. If such agreement did not confer jurisdiction over the person of the appellant, then the court acquired and possessed no jurisdiction over him. It is provided by section 34, 2 Rev. Stat. 1876, p. 46, that "a civil action shall be commenced by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and

McCormack v. The First National Bank of Greensburgh *et al.*

the action shall be deemed to be commenced from the time of issuing the summons; but, as to those against whom publication is made, from the time of the first publication. The summons shall be issued by the clerk, under the seal of the court, and directed to the sheriff, and shall notify the defendant of the action commenced, the parties thereto, and the court where pending."

Section 35, 2 Rev. Stat. 1876, p. 47, is as follows:

"The summons shall be served, either personally on the defendant, or by leaving a copy thereof at his usual or last place of residence. An acknowledgment on the back of the process, or the voluntary appearance of a defendant, is equivalent to service."

An action against a resident can only be commenced in vacation by the filing of a complaint and the issuing of a summons, and in term time by the filing of a complaint and a voluntary appearance thereto. *Sturgis v. Fay*, 16 Ind. 429; *Beard v. Beard*, 21 Ind. 321; *Ireland v. Montgomery*, 34 Ind. 174; *Temple v. Irvin*, 34 Ind. 412; *Harshman v. Armstrong*, 43 Ind. 126; *Rhoades v. Delaney*, 50 Ind. 468.

The filing of the complaint and the issuing of the summons do not confer jurisdiction over the person of the defendant.

This may be done in four ways:

1. By reading the summons to the defendant.
2. By leaving a copy thereof at his usual or last place of residence.
3. By an acknowledgment of service, entered on the back of the summons.
4. By the voluntary appearance of the defendant, either in person or by attorney.

When the action is against a non-resident, jurisdiction over the subject-matter of the action is conferred by publication.

Jurisdiction over the person of the defendant must be acquired, either by the issuing and service of process, in one

McCormack v. The First National Bank of Greensburgh *et al.*

of the modes above pointed out, or by a voluntary appearance.

It is conceded that in the action sought to be reviewed there was no process issued.

It remains to inquire whether the agreement entered on the complaint constituted a voluntary appearance to the action.

It should be borne in mind that the agreement was made in vacation, and entered on the complaint, and that the complaint was not filed until the day on which the judgment was rendered, and that the appellant was not in court, either in person or by attorney, when the complaint was filed, rule entered and judgment taken for a failure to answer. It is settled law, that a full and voluntary appearance cures all errors and defects in process, and that there can be no appearance unless of record.

There must be some formal entry, or plea, or motion, or official act, to constitute an appearance; and this should be of record, and tried by the record. *Shirley v. Hagar*, 3 Blackf. 225; *Cassady v. Reid*, 4 Blackf. 178; *Carson v. The Steamboat Talma*, 3 Ind. 194; *Scott v. Hull*, 14 Ind. 136; *Robinson v. The Board of Comm'rs, etc.*, 37 Ind. 333.

In the case last cited, the court, in the opinion overruling a petition for a rehearing, say:

“Assuming that the proceeding was of an adversary character, then, to make Robinson a party, he must have been brought in in some mode prescribed by law, or he must have voluntarily appeared to the proceeding. The record does not show that he became a party in either of these modes; or, in other words, that he was a party at all.”

In our opinion, the first paragraph shows that the court below did not acquire any jurisdiction over the person of the appellant, in any mode required by law, and that consequently the judgment rendered in the original action was and is a nullity and void.

The matters alleged in the second paragraph of the com-

McCormack *v.* The First National Bank of Greensburgh *et al.*

plaint are admissible under the first, and, hence, it is not necessary that we should pass upon its sufficiency.

Other questions have been discussed with marked ability, but the conclusion at which we have arrived renders it improper that we should pass upon them now.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to overrule the demurrer to the first paragraph of the complaint, and for further proceedings in accordance with this opinion.

ON PETITION FOR A REHEARING.

NIBLACK, J.—The First National Bank of Greensburgh, one of the appellees, has filed a very elaborate and carefully prepared petition for a rehearing in this cause, and we have given it very careful consideration.

This court, when before considering this case, seemed to regard the question as to whether there was really an appearance by the appellant in the court below, as the preliminary and at the same time the most important one to be decided. After a full review of all that has been presented, we feel impelled to adhere to that view of the case, in our present action upon it.

If there was no appearance by the appellant, in some form recognized by law, the court below had no jurisdiction to render any judgment against him, and it is immaterial to him what other errors, if any, were committed.

An appearance, according to the ancient practice, purports to be a proceeding in term time, and that theory still exists in legal contemplation.

Where there is a rightful departure from that theory, it is in obedience to some statute. In our State, the personal presence of the party by himself or his attorney in court and a submission to its authority are necessary to constitute an appearance to an action or a judicial proceeding. An appearance is a proceeding in court, and must be noted of record. Where entered in a cause, it must constitute a part

McCormack v. The First National Bank of Greensburgh *et al.*

of the record of the proceedings in it. See *Scott v. Hull*, 14 Ind. 136, and other authorities there cited on that point.

Tested by these rules, we are unable to perceive how it is possible for us to hold that the indorsement by the appellant on the complaint, in the court below, and copied in the previous opinion in this cause, constituted an appearance in that court. We would willingly so hold, if we felt authorized to do so, but we cannot.

Whatever that indorsement may purport to be, or may in good faith have been intended to be, it was not, in our opinion, an appearance, within the meaning of the statute authorizing a defendant to appear voluntarily to an action without process being served upon him.

But it is insisted that, while the indorsement on the complaint, as above stated, may not technically constitute an appearance, still the appellant is estopped, by the terms of the indorsement, from setting up, in this action, that it was not an appearance.

We do not concur in that view of this case.

Whether the indorsement could be made to have any legal effect whatever, as between the parties, or in any other way, we need not and do not now inquire. We have only to deal with that indorsement, here, as a jurisdictional question affecting a public tribunal, and not as it may affect the private rights of the parties or any merely private interest.

It is not a case, we think, in which the office of an estoppel can be in any manner applied, so as to affect the question of jurisdiction in the court below.

It is also insisted that an adherence to the rules laid down in the opinion already pronounced in this cause will have the effect to destroy and to practically sweep away a large number of judgments and decrees heretofore rendered in the several courts of this State under circumstances similar to those under which the judgment sought to be reviewed in this action was rendered, and that hence we ought to hesitate to adhere to an opinion so disastrous in its consequences. In cases of great doubt, the courts are some-

Bucklen v. Huff.

times justified in considering what line of action will best comport with public policy or the general welfare. Especially may this be so in cases of public importance, but such considerations cannot be taken into account where it is reasonably clear what the action of the court ought to be in any given cause under the law. We have no such doubts, in the case at bar, as make it proper for us to consider the consequences of the conclusion at which we have arrived.

The petition for a rehearing is, therefore, overruled.

BUCKLEN v. HUFF.

PRINCIPAL AND SURETY.—*Extension of Time of Payment.*—*Alteration of Written Instrument.*—Where, by agreement between the maker and payee of a promissory note bearing eight per cent. interest, without the knowledge or consent of a surety thereon, in consideration that the payee would extend the time for the payment of the note for an indefinite period after its maturity, until he should demand payment, the maker endorsed on the note the following: "I hereby agree to pay ten per cent. interest on this note hereafter," dated the day before the maturity of the note, and signed by the maker; and, in pursuance of the agreement, the payee did extend the time for a long period after the maturity of the note;

Held, that the new contract, viewed as a contract for the extension of time, did not discharge the surety.

Held, also (BIDDLE, J., dissenting), that said agreement endorsed on the note was not a merger and abrogation of the contract contained in the note in respect to the payment of interest, or such an alteration of the original contract as would discharge the surety in an action on the original contract.

SAME.—*Alteration of Note.*—*Spoliation.*—*Negligence of Payee.*—Where, a short time before the maturity of a promissory note bearing eight per cent. interest, the payee required the payment of ten per cent. interest for such time as the note should run after maturity; and the maker thereupon altered said note, so as to make it stipulate that it should bear interest at the rate of ten per cent., instead of eight per cent.; and the payee, being unable to write or read writing, and having no knowledge of the alteration thus made, and not assenting thereto, received the note again from

Bucklen v. Huff.

the maker and retained it after maturity, receiving from the maker the increased rate of interest, without knowledge of said alteration or assent thereto;

Held, that the alteration was a mere spoliation of the note, and did not affect the payee's right to recover on the note as it existed before the spoliation, against a surety thereon, and the payee could not be regarded as guilty of such negligence as would deprive him of such right to recover.

From the Elkhart Circuit Court.

J. H. Baker and J. A. S. Mitchell, for appellant.

H. D. Wilson, J. D. Osborn, R. M. Johnson and — Herr, for appellee.

WORDEN, J.—This was an action by the appellee against the appellant and one Myron E. Cole, upon a note, of which the following is a copy, viz.:

“ELKHART, IND., July 30th, 1866.

“Two years after date, I promise to pay to the order of Mary Huff seven hundred dollars, with interest, payable annually, at the rate of eight per cent.; value received, without any relief from valuation and appraisement laws.

“MYRON E. COLE.

“ISAAC BUCKLEN, Security.”

Answer by Bucklen, issue, trial by jury, verdict and judgment for plaintiff.

The points relied upon by counsel for the appellant, for a reversal, are the sustaining of a demurrer to the second paragraph of his answer, and the overruling of a demurrer to the third paragraph of plaintiff's replication to the third paragraph of the answer.

The following are the pleadings involved:

The second paragraph of the answer admits the execution of the note by the defendant, as the surety of Cole, but alleges, that “the plaintiff, without the knowledge or consent of this defendant, on the 29th day of July, 1868, made and entered into a new agreement with the said Cole, whereby it was mutually agreed between the plaintiff and the said Cole, that, in consideration that the said Cole would enter into a valid and binding agreement with the plaintiff

Bucklen v. Huff.

to pay ten per cent. interest for the use of the money which was the consideration of said note, from that date, the plaintiff would extend the time for the payment of said note for an indefinite period, until she should thereafter demand said money; and this defendant says that, in pursuance of said agreement, the said note was, without the knowledge, consent and agreement of the plaintiff" [defendant?], "altered and changed in a material part thereof, by writing on the back thereof the following agreement:

“‘I hereby agree to pay ten per cent. interest on this note hereafter. July 29th, 1868. M. E. COLE.’

“Which alteration and agreement was so made without the knowledge or consent of this defendant; and this defendant says that said writing and agreement so made and endorsed on said note was made with the mutual intention and especial agreement by and between said plaintiff and Cole of changing the same note from a note stipulating for and drawing eight per cent. interest to a note stipulating for and drawing ten per cent. interest, and was made with the mutual intention of conforming said note to said new agreement, it being mutually agreed and especially contracted, that from the time of the making of said endorsement the stipulation contained in the face of said note, calling for eight per cent. interest, should be abrogated and discharged by said alteration endorsed on said note.

“And this defendant says that after said alteration and agreement were so made, said note was, and was intended to be, by said plaintiff and defendant Cole, a contract for ten per cent. interest, and said contract and stipulation in said note for eight per cent. interest was, by the mutual consent and agreement of said Cole and plaintiff, abrogated, satisfied and merged into said new agreement above mentioned; that said Cole, in pursuance of said new agreement, retained the use of said money for more than a year after the making of said alteration and agreement, during all of which time the plaintiff demanded and received ten per cent. interest on said note, which interest was demanded and paid

Bucklen v. Huff.

in pursuance of said alteration and new agreement; that the plaintiff, in her complaint in this behalf filed, claims and demands interest according to the terms of said new contract endorsed on said note; that at the time said new agreement was made, the said Cole was a resident of the State of Indiana, and was solvent, and that from the time of the commencement of this suit until now, the said Cole was and still remains insolvent; that all of the agreements, alterations and payments aforementioned were without the knowledge or consent of this defendant; wherefore," etc.

The third paragraph of the answer admits the execution by defendant of the note as set out in the complaint, as the surety of Cole, but alleges, that "the plaintiff, on the 29th day of July, 1868, demanded of the defendant Cole ten per cent. interest for the use of the money which was the consideration of said note, from thence forward, so long as he should keep the same; that in pursuance of said demand, the said Cole altered said note in a material part thereof, in this, that said note was made to stipulate for and draw ten per cent. interest, instead of eight per cent.; that after said note was so altered by the said Cole, the said plaintiff received the same into her custody, and thereafter, in accordance with said change so made, demanded and received said enhanced rate of interest; that said alteration so made was made without the knowledge, consent or acquiescence of this defendant; that after said alteration so made as aforesaid, the said plaintiff retained the said note, and permitted the said Cole to retain the said money for more than one year, receiving thereon ten per cent. interest, and in all respects treating said note as a note drawing ten per cent. interest, of all which this defendant was ignorant; wherefore," etc.

The third paragraph of the replication avers, "that she, the plaintiff, cannot, and could not at the date of the alleged alteration of said note, read writing nor write, and did not, at the time, nor since then, have any knowledge of the alteration so charged to have been made; that she never gave her assent to any alteration or change of the same, and never

Bucklen v. Huff.

notified [ratified?], or in any manner consented to change the said contract evidenced by said note, and, if such alteration has been made, it was done without her knowledge or consent."

We may remark, before proceeding to the main question involved in the second paragraph of the answer, that the allegation therein, that the plaintiff by her complaint "demands interest according to the terms of said new contract endorsed on said note," is hardly supported by the complaint.

The complaint counts upon the note as it was originally executed, according to the copy set out, without any allusion or reference to the new contract endorsed upon it. It alleged that there was interest due on the note to the amount of seventeen dollars and fifty cents, a sum much less than would accrue at the rate of eight per cent. from the maturity of the note until the suit was brought.

There is nothing in the complaint which indicates that the plaintiff sought any advantage from the new contract.

There are some allegations in the paragraph, as to what was mutually agreed and understood by the parties as to the legal effect of the new contract endorsed upon the note, which can have but little or nothing to do with the question involved. The force and legal effect of the contract must be determined from the contract itself, and not from the understanding or cotemporaneous agreements of the parties not embraced in the terms of the contract.

The material allegations of the paragraph are, that in consideration that the plaintiff would extend the time for the payment of the note for an indefinite period, until she should thereafter demand the money, Cole made the agreement endorsed on the note, without the knowledge or consent of the defendant, and that in pursuance of the agreement the plaintiff did extend the time, etc.

The new contract, viewed merely as a contract for the extension of time, did not discharge the surety, because no definite time of extension was agreed upon.

The plaintiff's hands were never for an instant tied up;

Bucklen v. Huff.

she could have commenced an action on the note immediately upon its becoming due, without violating any stipulation on her part. Where such is the case, the authorities are clear that the surety is not discharged by extension of time. *Meniffee v. Clark*, 35 Ind. 304.

But it is urged by counsel for the appellant that the new contract, endorsed upon the note, was a merger and abrogation of the contract contained in the note to pay interest at the rate of eight per cent., and was therefore such an alteration of the original contract as discharges the surety. The case has been once before in this court, *Huff v. Cole*, 45 Ind. 300, when the court said upon this point, "We do not regard the contract by the principal in the note, shown by the endorsement, as of itself sufficient to change, alter, or supersede the contract evidenced by the face of the note.

"It was the agreement of the principal to pay a higher rate of interest than that mentioned in the face of the note. It does not purport to be an alteration of the contract evidenced by the face of the note, but only an additional stipulation to which the principal and the creditor only are parties. Had it been upon a separate paper, it would hardly have been supposed to be an alteration of the note."

We see no reason to change the conclusion then arrived at. There are reasons which we think are conclusive that the new contract did not merge or abrogate the old, in respect to payment of interest. If the new contract merged the old, in respect to the payment of interest, that result was effected the moment the endorsement was made on the note. If that result was not then brought about, it was not afterwards by the actual extension of time. But we have seen that the plaintiff did not stipulate for any definite extension of time. She might have brought her action at once, upon the note's falling due, and have recovered in accordance with its terms; for in that case she would not have granted the contemplated extension, which was to be the sole consideration for the new agreement. If she might have then brought her action upon the note, and have recovered according to its

Bucklen v. Huff.

terms, because the old agreement as to interest was not merged in the new, she may do it now. No event has occurred, subsequent to the endorsement, that would effect such merger of the old contract in the new.

We are of opinion that the paragraph was bad, and the demurrer to it correctly sustained.

We are also of the opinion that the court committed no error in overruling the demurrer to the replication to the third paragraph of answer.

From the answer and the replication it may be gathered that, a day or two before the note matured, the plaintiff required the payment of ten per cent. interest for such time as the note should run after maturity; and it may be assumed that the plaintiff had the note present at an interview which she had with Cole on the subject; that Cole was willing to pay the ten per cent., and thereupon took the note and made the alleged alteration; that the plaintiff could not write or read writing, and had no knowledge of the alteration thus made, and did not assent thereto; that she received the note back from Cole, not knowing of or assenting to the alteration which he had made, and afterwards received from him the rate of interest which she had required.

This, in our opinion, was a mere spoliation of the instrument, and did not affect the plaintiff's right to recover upon it, as it existed before such spoliation. 1 Greenl. Ev. sec. 566. Nor do we think the plaintiff was guilty of any such negligence in the premises as would deprive her of the right thus to recover.

Error is assigned by the appellant upon the overruling of a motion made by him for a new trial, but no notice is taken of it in the brief of his counsel.

We find no error in the record.

The judgment below is affirmed, with costs and five per cent. damages.

Bucklen v. Huff.

ON PETITION FOR A REHEARING.

BIDDLE, J.—I am constrained to dissent from the majority of the court in overruling this petition for a rehearing. It seems to me that the decision of the case is placed upon a wrong ground.

I concur with the opinion of the court in holding that the endorsement upon the note is not a valid agreement to extend the time of payment, and thereby discharge the surety; but, in my judgment, it is a merger of the note which the surety signed, and, thereby he is discharged from all liability. There is a clear distinction between giving time on a contract and changing its terms.

That the agreement upon the back of the note, in these words: "I hereby agree to pay ten per cent. interest on this note hereafter," and signed by the maker, was obligatory between the maker and the payee, has been fully settled by this court. The case of *Harden v. Wolf*, 2 Ind. 31, was founded on a note made by Harden and Hall, payable on the 25th day of November, 1841, with interest at the legal rate.

Upon the back of the note was endorsed the following agreement:

"November 29th, 1841.

"It is agreed that the within is to bear at the rate of ten per cent.

HARDEN & HALL."

In deciding this case, the court say:

"We think the contract, made at the date of the note, to pay the same with six *per cent.* interest, was merged in the new agreement made at the time of the indorsement, and that the note, with the indorsement, imports an agreement to pay the sum therein specified with six *per cent.* interest to the date of the indorsement, and ten *per cent.* thenceforward, until the note should be paid. The new agreement amounted to the same thing, in effect, as if the note had

Bucklen v. Huff.

been cancelled and a new note had been executed bearing ten *per cent.* interest."

And this case is cited and approved in *Beckner v. Carey*, 44 Ind. 89. Beckner had made two notes to Mahan for one thousand dollars each, payable with interest at six per cent. Afterwards, the following contract was endorsed on each of the notes:

"I do agree to pay (ten) 10 per cent. interest on the within note, from the 25th day of December, 1869, until paid.

JACOB BECKNER."

This court held that the original notes were merged in the new ones, and became notes payable with interest at the rate of ten per cent., instead of six. In these two cases there is no right of a surety involved, but they establish the law as to merger of contracts, which is supported uniformly by both English and American authorities. I think, therefore, that in the case we are considering, when the agreement was endorsed upon the original note, it became a new note, as effectually as if it had been written on a separate piece of paper and the old note destroyed. When there is a merger, the surety on the original note is necessarily discharged, and the payee cannot abandon the new contract and hold the surety on the old one, after it has been merged. The same contract cannot be two contracts, nor can it be either the one or the other as the payee chooses.

In the case of *Schnewind v. Hackett*, decided at the present term of this court, March 7th, 1877, it was held that when, by an agreement between the maker and the payee, the words "at ten per cent." were added in the face of the note, immediately after the words "with interest,"—thus changing the rate of interest which the note bore from six per cent. to ten per cent.—this discharged the surety; and the previous rulings of this court upon the same question were cited and approved. Now, what legal difference there can be between an agreement written in the face of a note, and an agreement to the same effect written upon the back of a note, I cannot

Dailey v. The City of Indianapolis.

perceive; and this is the only difference between the two cases.

In this case, as I view it, a rehearing should be granted, the judgment reversed, the cause remanded and the surety discharged.

DAILEY v. THE CITY OF INDIANAPOLIS.

SUPREME COURT. — *Jurisdiction.* — *Action Commenced Before Mayor.* — The Supreme Court has no jurisdiction of an appeal in an action commenced before the mayor of a city to recover a penalty for a violation of a city ordinance, where the amount in controversy in such appeal, exclusive of interest and costs, does not exceed ten dollars.

From the Marion Civil Circuit Court.

J. W. Gordon, for appellant.

C. Byfield, for appellee.

HOWK, J. — This was an action commenced before the mayor of the city of Indianapolis, to recover a penalty for an alleged violation of a city ordinance. The trial before the mayor resulted in a finding in favor of appellee, and the assessment of a fine against the appellant in the sum of five dollars. From the judgment of the mayor appellant appealed to the court below. In this latter court a trial was had, which also resulted in a finding in favor of appellee and a judgment against appellant for the sum of five dollars, the fine assessed, and the costs of the action. From this judgment of the court below the appellant has appealed to this court, and has assigned on the record several alleged errors.

But the question which meets us on the threshold of this case is this: Has this court jurisdiction of this cause?

Section 550 of the Practice Act provides, among other things, as follows:

“ Appeals may be taken from the courts of common pleas and the circuit courts, to the Supreme Court, by either party, from all final judgments, except in actions originating before a justice of the peace, or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed ten dollars.” 2 Rev. Stat. 1876, p. 238.

This provision of our code has received a judicial construction by this court, in the case of *Bogart v. The City of New Albany*, 1 Ind. 38, which is directly in point. In that case, the learned judge who wrote the opinion of the court used this language :

“ In the case before us, though the plaintiff claims more than twenty dollars in her declaration, yet she recovered but ten, and with that amount she is content. The defendant claims the allowance of no set-off rejected below, and only seeks in this court to obtain a decision that shall relieve him from the payment of the judgment of ten dollars. This amount does not give us jurisdiction, and the writ of error must be dismissed.” See, also, to the same effect, the cases of *Tripp v. Elliott*, 5 Blackf. 168 ; *Reed v. Sering*, 7 Blackf. 135 ; *Jones v. Yetman*, 6 Ind. 46 ; *Moffitt v. Wilson*, 44 Ind. 476 ; *Bowers v. The Town of Elwood*, 45 Ind. 234 ; and *Quigley v. The City of Aurora*, 50 Ind. 28.

Following in the line of these authorities, the appeal in this action is dismissed, for want of jurisdiction, at the costs of the appellant.

WIDUP v. GIBSON ET AL.

JUSTICE OF THE PEACE. — *Pleading.* — *Names of Parties.* — *Signing Complaint.* — The Supreme Court will not reverse a judgment in a suit commenced before a justice of the peace, for the overruling of a demurrer to the complaint, because it does not contain the full names of the parties and is not signed by the plaintiff or his counsel.

53	484
162	491
53	484
165	25

Widup v. Gibson *et al.*

SAME.—Costs on Appeal.—Where, on appeal from a judgment of a justice of the peace to the circuit court by the judgment-defendant, the judgment was against the same party, and that before the justice was not reduced five dollars, but if the interest accrued between the trials, which was included in the judgment, were deducted, the judgment of the justice would have been reduced more than five dollars;

Held, that the costs in the circuit court should follow the judgment.

From the Kosciusko Circuit Court.

C. Clemans and *J. A. Clemans*, for appellant.

J. H. Taylor and *L. W. Royse*, for appellees.

PERKINS, J.—Suit, commenced before a justice of the peace, upon an account, a bill of particulars of which was filed as a complaint. Judgment before the justice against the defendant for one hundred and twenty-five dollars and twenty-three cents, and appeal by the defendant to the circuit court. Judgment in that court against the the defendant, for one hundred and twenty-eight dollars and ninety-seven cents and costs.

The first objection to the proceedings in the circuit court is, that the court overruled a demurrer to the complaint. The objections to it were:

1. That the complaint did not contain the full names of the parties, plaintiff and defendant.

2. That it was not signed by the plaintiff or his counsel.

In suits before a justice of the peace, if the full names of the parties appear in the writ and in the title of the cause, they need not appear in the complaint. *Clark v. Dunlap*, 2 Ind. 551.

“The failure to subscribe the complaint is such a merely formal or clerical error as the plaintiff should have been permitted to amend, when pointed out in the court below, and will be considered as amended here.” *Harris v. Osenback*, 13 Ind. 445. See *Fankboner v. Fankboner*, 20 Ind. 62.

We cannot disturb the judgment upon the evidence.

There was a direct conflict in the evidence touching some of the items of the account rendered. It was for the court below to determine the credibility of the witnesses.

Bryson, Administrator, v. Kelley.

Another ground of objection to the judgment below is, that the court erred in refusing to tax the costs in the circuit court against the plaintiff.

The judgment before the justice, as we have seen, was one hundred and twenty-five dollars and twenty-three cents, and the judgment on appeal was one hundred and twenty-eight dollars and ninety-seven cents; so that the judgment was not reduced five dollars, or any amount, but was increased on appeal. The increase was produced in this wise: The judgment before the justice was rendered June 17th, 1873. The trial in the circuit court was on the 23d of October, 1874, a year and four months after the trial before the justice; and the interest for that period being included in the judgment in the circuit court—about ten dollars—increased it about three dollars and a half over that of the justice; but the judgment of the justice, on the facts of the case, was found to be five dollars or more too large. But the judgment in the circuit court was not reduced, and we think we should not look beyond the judgment itself, in determining this question of costs. 2 Rev. Stat. 1876, p. 627.

The judgment is affirmed, with costs.

BRYSON, ADMINISTRATOR, v. KELLEY.

DECEDENTS' ESTATES.—Pleading.—Exhibit.—Where a claim is filed against a decedent's estate for money collected on a note belonging to the claimant by the deceased in his lifetime and appropriated to his own use, such note need not be filed with the claim.

SAME.—Where a claim was filed against a decedent's estate, founded on an alleged agreement by which the claimant sold certain lands to the deceased in his lifetime for a certain sum, on condition that the latter should resell said lands, and that whatever he should realize over said sum, deducting expenses therefrom, should be refunded to the claimant; and it was alleged that the deceased sold the lands for a certain sum,

Bryson, Administrator, v. Kelley.

larger than the price paid by him to the claimant, and refused to pay the difference ;.

Held, that it was not necessary to file such agreement with the claim.

From the Huntington Circuit Court.

Sayler & Kenner and *Branyan & Watkins*, for appellant.

Ibach & Stults, for appellee.

BIDDLE, J.—Margaret J. Kelley filed an account against the estate of Lorenzo D. Van Becker for money collected on a note by the deceased in his lifetime and appropriated to his own use; also a claim founded on an alleged agreement, by which said Margaret sold certain lands in Wabash County to the deceased for three thousand five hundred and eighty-two dollars, on condition that said deceased should resell the lands, and whatever he realized over said amount, deducting expenses therefrom, should be refunded to the said Margaret; that he sold the land for four thousand eight hundred and ten dollars, and refused to pay the difference.

Demurrers, alleging an insufficient statement of facts as cause, were overruled to each of these claims, and exceptions taken.

An answer of general denial and five special paragraphs was filed against the claims, and issues formed upon the latter by a reply of general denial. Trial by jury. Verdict for one thousand four hundred and forty-six dollars and seventy-five cents. Judgment on the verdict, over a motion for a new trial, and exceptions.

The ground of demurrer taken against the first account was, that the note was not filed with the complaint. This was not necessary. It was not founded upon the note, but upon the money collected upon the note and converted by the deceased.

The same ground of demurrer was taken against the second account, but we think without effect. It counts upon the difference between the amount of the purchase and sale of the lands; and after the sale was made and the agreement became executed, it was not necessary to file it with the complaint. We think that both accounts are sufficiently

The Pittsburgh, Cincinnati & St. Louis Railway Co. v. Hackney.

stated. In such cases, a succinct statement is all that is required. *Ginn v. Collins*, 43 Ind. 271; *Post v. Pedrick*, 52 Ind. 490.

It is also forcibly urged, that the evidence, which is all in the record, does not support the verdict.

There is evidence tending to show that there was such an agreement made as is set out in the second paragraph of the complaint. It shows a mortgage made by James E. Kelley and the appellee to the deceased, on certain lands in Wabash county, to secure certain notes; and shows a conveyance by deed, of a later date, of the same lands, to Robert K. Rhodes, by the deceased; but we can find no evidence of any sale of lands by the appellee to the deceased, as alleged in the second paragraph of her complaint, nor that the land was ever sold under the mortgage. For aught that appears in the case, the title of the lands is still in the appellee, or in the estate of James E. Kelley, or in his heirs, subject to the mortgage above stated; at least, it is nowhere shown to have been sold or conveyed to the deceased. For the want of this link in the chain of evidence, the judgment must be reversed.

The judgment is reversed; cause remanded, with instructions to sustain the motion for a new trial, and to further proceed, etc.



THE PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY
Co. v. HACKNEY.

RAILROAD.—*Killing Live Stock—Evidence.*—In an action against a railroad company to recover for the killing or injuring of live stock by its cars at a point on its track where the track might have been fenced, but was not, the allegation that the track was not fenced must be proved on the trial.

From the Blackford Circuit Court.

The State v. Fries.

N. O. Ross, for appellant.

W. A. Bonham and *J. Cantwell*, for appellee.

PERKINS, J.—This was a suit by Hackney against the Pittsburgh, Cincinnati & St. Louis Railway Company, to recover the value of a heifer, alleged to have been killed by a locomotive of the road.

The suit was commenced before a justice of the peace.

The complaint charges no negligence on the part of the road, but alleges, as the cause of action, simply this: that, while the employes were running the locomotive on the track, etc., in the county of, etc., said locomotive passed over and killed one red heifer, the property, etc., of the value, etc., at a point where the road was not fenced, etc., but where it might have been, etc.

On the trial, there was evidence tending to show the killing of the heifer, but there was no evidence tending to show that the road was not fenced. Simply proving that the heifer was killed did not make out a cause of action against the road. It was necessary, under the complaint in this case, to prove the allegation that the road was not fenced. The allegation was a material one. *The Indianapolis, etc., R. R. Co. v. Wharton*, 13 Ind. 509. See *The Jeffersonville, etc., R. R. Co. v. Underhill*, 40 Ind. 229.

The judgment is reversed, with costs; cause remanded for further proceedings.

THE STATE v. FRIES.

CRIMINAL LAW.—*Statute of Limitations.*—*Concealment of Crime.*—*Forgery.*—

In an indictment charging that the defendant, while trustee of a certain township, falsely, fraudulently and feloniously altered a certain receipt taken by him as such trustee for money by him paid to the person who signed the receipt, out of the funds of the township, and for its benefit,

The State *v.* Fries.

by raising the amount of said receipt, with the felonious intent to defraud said township, it was alleged that the defendant, in his settlement with his successor in said office, for the purpose of concealing said alteration, falsely and fraudulently made his report and annual settlement sheet and account and his record to correspond with said receipt as so altered, by making the entries therein falsely show the payment by him of the amount of money mentioned in said altered receipt as indicated thereby, and then and there and thereby concealed the fact of said crime, whereby it was not discovered until, etc., showing that, by not including the time of the alleged concealment, there was a lapse of less than two years between the commission of the offence and the commencement of the prosecution, but that by including the period of concealment, more than two years intervened. *Held*, that the allegation as to concealment was not sufficient, such entries in the public records of the township not being a concealment of the fact of the crime.

From the Franklin Circuit Court.

C. A. Buskirk, Attorney General, and *Berry & Berry*, for the State.

BIDDLE, J. — Indictment for forgery. The crime is charged as follows:

“That, on the 8th day of April, 1869, and from that time continuously up to the 20th day of October, A. D. 1872, one Anthony Fries was trustee of Brookville township, Franklin county, State of Indiana, duly and lawfully elected and qualified; that, while acting in his official capacity as such trustee, the said Anthony Fries, on the 6th day of April, A. D. 1872, at said county, paid over to one Henry Crist the sum of one dollar and ninety cents, for wood delivered for school district number six, in said township and county aforesaid; said sum of money being paid out of the funds of said township aforesaid; said Anthony Fries took, as such trustee aforesaid, a receipt from said Henry Crist, under the name and style of ‘H. Crist,’ for said amount of money, in the figures and words following, to wit:

“\$1.90. BROOKVILLE, IND., April 6th, 1872.

“‘Received of Anthony Fries, trustee of Brookville township, Franklin county, Ind., the sum of one dollar and ninety cents, for wood delivered school district number six.

“‘H. CRIST.’

The State v. Fries.

“ And that afterwards, to wit, on the 20th day of September, 1872, at said county, said Anthony Fries unlawfully, feloniously, and falsely forged, changed and altered said receipt aforesaid, by then and there changing and altering the figures on the margin of said receipt, and making them read ‘\$21.90,’ instead of ‘\$1.90,’ and by then and there inserting the word ‘twenty’ in the said receipt, before the word ‘one’ in said receipt, then and there making said receipt read ‘twenty-one’ instead of ‘one,’ and then and there and thereby causing and making said receipt first mentioned above to read as follows, to wit:

“‘\$21.90. BROOKVILLE, IND., April 6th, 1872.

“‘ Received of Anthony Fries, trustee of Brookville township, Franklin county, Ind., the sum of twenty-one dollars and ninety cents for wood delivered school district number six.

H. CRIST,’

“ With the felonious intent then and there and thereby to defraud the said Brookville township aforesaid; and afterwards, to wit, on the 20th day of October, 1872, at said county, the said Anthony Fries made a settlement with Louis M. Wiley, his successor in said office of trustee of said township in said county, duly and lawfully elected and qualified as required by law; and the said Anthony Fries, for the purpose of concealing the fact of said crime, to wit, the alteration of said receipt as aforesaid, then and there falsely and fraudulently made his report and annual settlement sheet and account and his record correspond with said false, forged and altered receipt, by then and there making the entries therein falsely show that he had, then and there, on the 6th day of April, 1872, paid out the said sum of twenty-one dollars and ninety cents, as first above mentioned, and then and there and thereby concealed the fact of said crime as aforesaid, whereby the said crime was not discovered until the 2d day of January, 1875; contrary,” etc.

The indictment was quashed, on motion of defendant. The State excepted and appeals.

The State v. Fries.

It will be observed, by the dates in the indictment, that the prosecution is barred by the lapse of time—two years—unless the time of the concealment of the crime, as alleged in the indictment, is excluded in computing the period of limitation. The sufficiency of the allegation of the concealment, therefore, is the main question presented in the case.

A construction was given to the statute, 2 Rev. Stat. 1876, p. 374, sec. 13, as far as this question is involved, in the case of *Jones v. The State*, 14 Ind. 120, wherein it was decided that the words “conceals the fact of the crime” must be held to mean the concealment of the fact that a crime had been committed, unconnected with the fact that the accused was the guilty perpetrator; and further, that such concealment must be the result of positive acts done by the accused, which were calculated to prevent the discovery of the fact of such crime. See, also, *Free v. The State*, 13 Ind. 324; *Ulmer v. The State*, 14 Ind. 52.

We cannot hold that the averment of concealment in this indictment is sufficient to bring the case within the exception of the statute.

We think the fact alleged, that the defendant, in his settlement with his successor, adjusted his account to correspond with the forged receipt, and thus made it a part of the public records of the township, open to the inspection of all persons who might be interested in the affairs of the office, was not calculated to prevent the discovery of the forgery; indeed, it seems to us to tend rather to the discovery than the concealment of the fact of the crime.

In our opinion, the court committed no error in quashing the indictment.

The judgment is affirmed.

Burbank *et al.* v. Slinkard *et al.*

BURBANK ET AL. v. SLINKARD ET AL.

SHERIFF.—*Liability for Default.—Compulsory Payment.—Execution for Use of Sheriff.*—Where a sheriff, by neglecting or refusing to return an execution within the period required by law, has become liable, under section 482 of the code, to the judgment-plaintiff in the amount which he might and should have levied by virtue of the execution, and the judgment-plaintiff has claimed payment of such amount of the sheriff, who has accordingly paid the judgment-plaintiff, such payment is compulsory, within the intent of section 676 of the code, and the judgment on which such execution was issued is not thereby discharged, but remains in force, the lien thereof on real estate unaffected, for the benefit of the sheriff, who is entitled to execution thereon for his use, to reimburse him for the amount he has thus been compelled to pay.

From the Greene Circuit Court.

W. I. Baker, L. Shaw, E. E. Rose, J. D. Alexander and E. Short, for appellants.

A. G. Cavins and E. H. C. Cavins, for appellees.

WORDEN, C. J.—This was an action by the appellants against the appellees, to enjoin the sale of certain lands upon an execution, and to adjudge the judgment on which it issued satisfied, upon the ground that it had been paid.

Issue, trial by the court, finding and judgment for the defendants.

The only question involved here is, whether the finding was sustained by the evidence.

The facts, briefly stated and stripped of extraneous matters not affecting the case, are these:

In May, 1871, Ari Armstrong recovered a judgment, in the court of common pleas of said county, against William Wines and others, for nearly seven hundred dollars. This judgment was a lien on certain real estate of Wines', situate in said county, which has been purchased by the plaintiffs on executions against Wines, issued upon judgments junior to that of Armstrong. These purchases were made, therefore, subject to the lien of Armstrong's judgment. An execution was issued on the Armstrong judgment in February, 1872, and was placed in the hands of Henry S. Slinkard,

Burbank et al. v. Slinkard et al.

who was then the sheriff of the county, for service. No levy seems to have been made under this execution; but several sums of money were paid to the sheriff by Wines, which sums, with proper deductions, were paid over to Armstrong, leaving a portion of the judgment unpaid. No return was made to this execution until the fall of 1874. After the return day of the execution, Armstrong's agent went to see Slinkard about the matter, and the latter said he had not the money. Armstrong's agent then consulted a lawyer about suing Slinkard on his bond, but commenced no suit. Afterwards, the agent saw Slinkard and told him that if he did not get the money, he would institute a suit against him, Slinkard, on his bond as sheriff, for it. Slinkard said, if he paid the money, he would have to advance it; but he soon after paid the residue of the judgment. This was about October 20th, 1872. In November, 1874, Slinkard procured an execution to be issued upon the judgment, for his use, upon which to make the amount so paid by him on the judgment, which was placed in the hands of Francis M. Dugger, who was then sheriff, for service. Dugger levied the execution upon the lands in question, when his proceedings were arrested by a temporary injunction, which, however, was dissolved upon the final trial of the cause.

The question arises, whether, on these facts, the judgment should be regarded as paid and for all purposes extinguished, or kept alive for the benefit of Slinkard.

Executions are returnable within one hundred and eighty days from their date. 2 Rev. Stat. 1876, sec. 412, p. 200.

"If any sheriff shall neglect or refuse to return any execution, as required by law, or shall make a false return thereon, he shall be amerced in such amount as he might and should have levied by virtue of the execution." 2 Rev. Stat. 1876, sec. 482, p. 222.

It is not controverted that, under the statute above quoted, Slinkard was liable to Armstrong for the unpaid residue of the judgment, at the time the former paid such residue.

We have also the following statutory provision:

Burbank et al. v. Slinkard et al.

“When any defendant-surety in a judgment or special bail or replevin-bail, or surety in a delivery-bond or replevin-bond, or any person being surety in any undertaking whatever, has been or shall be compelled to pay any judgment or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship, or when any sheriff or other officer, or any surety upon his official bond, shall be compelled to pay any judgment or any part thereof, by reason of any default of such officer, except for failing to pay over money collected, or for wasting property levied on, the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety, officer, or other person making such payment, and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use.” 2 Rev. Stat. 1876, sec. 676, p. 297.

There can be no doubt, under this provision, that if Slinkard was “compelled” to pay Armstrong the residue of the judgment, the judgment was not thereby discharged; but Slinkard was entitled to have execution thereon for his use, to reimburse him for the amount he was thus compelled to pay. This, as we understand the brief of counsel for the appellants, is conceded. But they claim that the payment made by Slinkard was voluntary, and not compulsory, and, therefore, that the case does not come within the statute.

We have come to a different conclusion. Slinkard was liable to Armstrong for the amount of the unpaid portion of the judgment. He was compelled by the law, and under threat of legal proceedings, to pay it. We do not decide that the threat of the suit added anything to the compulsory character of the payment. It seems to us that it was sufficient that Slinkard was by law liable to Armstrong for the money, and that the latter claimed it of him. There was a legal compulsion on Slinkard to pay it, upon Armstrong’s demand.

It is a maxim of the law, that what one may be compelled to do by suit, he may do without suit. No good purpose

Burbank *et al.* v. Slinkard *et al.*

would have been subserved by withholding payment until suit and judgment; but payment without suit saved useless litigation and unnecessary costs.

We are of opinion that where the officer is liable to the judgment-creditor, and the latter claims payment of him, which is accordingly made, the payment is compulsory, within the spirit and intent of the statute. All the analogies of the law, it seems to us, favor this construction.

The case is totally unlike those that have been cited by counsel for the appellants, in which it has been held that a party who voluntarily pays an illegal claim against him cannot recover it back of the party to whom it is paid; and that such payment will be regarded as voluntary, unless made to release the person or property from process; a threatened action being insufficient to render the payment compulsory. *The Town of Ligonier v. Ackerman*, 46 Ind. 552, and cases there cited.

An important difference between those cases and that in judgment is found in the difference between an illegal and a legal claim. The law does not compel the payment of the former, while it does of the latter. A party upon whom an illegal demand is made should resist payment, and not supinely pay it, without setting up his defence, expecting to afterwards recover back the payment. But a party upon whom a legal demand is made is justified in making payment without resistance. Such a payment, it seems to us, entitles the party making it to all the rights which he would have if the payment had been extorted by means of a judgment and execution against him, he, of course, taking the burthen of showing, where the fact is material, that the demand was a legal one which could have been enforced by action against him.

We are of opinion that the finding was sustained by the evidence, and hence, that the motion for a new trial was correctly overruled.

The judgment below is affirmed, with costs.

Baker v. The Board of Commissioners of Washington County.

BAKER v. THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY.

BOND.—*Consideration*.—A bond for the payment of money imports a consideration, like a bill of exchange or promissory note, and therefore need not recite any consideration.

SAME.—*County Commissioners*. — *Power to Contract*.—Where a penal bond for the payment of money (and therefore importing an executed consideration) has been taken by a board of county commissioners, the obligor having authority to make it, the right of the board to recover in an action thereon cannot be denied on the ground of want of authority to take it, where it does not appear but that the money, for the payment of which the bond was given, is due the board as a corporation in the exercise of its legitimate power.

From the Washington Circuit Court.

T. L. Collins and A. B. Collins, for appellant.

F. L. Prow, for appellee.

BIDDLE, J.—Suit on a penal bond, in the ordinary form, made to the board of commissioners of the county of Washington, for the payment of two hundred dollars, with a condition that if the obligors, or either of them, shall pay the said board, or their agent of the three per cent. fund, the sum of one hundred and twenty dollars, the bond shall be void.

A demurrer, alleging a want of facts, was overruled to the complaint. An answer of several paragraphs was filed, to the first and second of which separate demurrers, alleging the same cause, were sustained. Exceptions were taken to each of these rulings, which present the only questions in the case.

The appellant, in support of his alleged error against the complaint, urges:

1. That the bond, which is the basis of the action, fails to recite any consideration.

Bonds for the payment of money, like bills of exchange and promissory notes, import a consideration. It therefore need not be alleged.

Baker v. The Board of Commissioners of Washington County.

2. That the board of commissioners had no authority, express or implied, to take such a bond, and, therefore, that the bond is void.

In considering this question, we must keep in mind the distinction between bonds made *against* the authority of law, and bonds made merely *without* the authority of law. The former, as a general rule, are void. The latter are sometimes valid. And it may be laid down as a general rule, that where either the obligor or obligee is without authority to make the bond, and it remains wholly executory, the courts will not enforce the obligation, although it may not be against authority of law.

Another distinction should also be remembered, between cases wherein the obligor, after he has received the consideration, sets up his own want of authority to make the bond, in avoidance of his obligation, and those cases wherein the obligor has authority to make the bond, but, before the consideration has been received, he sets up as a defence the want of authority in the obligee. In the former class of these cases the courts will go as far as is consistent with the fixed rules of law, to reach the justice, equity and good conscience of the case; in the latter class, when the obligation remains wholly executory, it will not be enforced.

In the case before us, there is no doubt that the obligor had authority to make the bond, and the bond itself imports an executed consideration. The question, then, is brought down to this: on such a bond can the obligee recover?

Early in the history of our State, in the case of *The Board of Commissioners of Gibson County v. Harrington*, 1 Blackf. 260, it was held, that the common law remedy in favor of the board, for money had and received for the use of the county, was not taken away by statute.

The same rule was held in *Helvey v. The Board of Commissioners of Huntington County*, 6 Blackf. 317. Of course, the money must be due to the board as a corporation in the exercise of their legitimate power.

If money thus due may be recovered on a common count,

Busenbarke, Executor, v. Ramey et al.

we cannot see why it could not be recovered on a bond given for the same money; and as there are many instances where money may be legitimately due the board, we cannot presume—there being no allegations in the pleadings to the contrary—that the money due upon this bond is not of that character.

Thus, we are conducted to the conclusion that the complaint in this case is sufficient. The following authorities will sustain us in these views: *Ridenour v. Wherritt*, 30 Ind. 485; *Smead v. The Indianapolis, Pittsburgh and Cleveland R. R. Co.*, 11 Ind. 104; *The State Board of Agriculture v. The Citizens Street Railway Co.*, 47 Ind. 407; *The Board of Commissioners of Tippecanoe County v. The Lafayette, Muncie and Bloomington R. R. Co.*, 50 Ind. 85.

The first and second paragraphs of answer are so clearly insufficient that we do not discuss them.

The judgment is affirmed, with costs and ten per cent. damages.

BUSENBARKE, EXECUTOR, v. RAMEY ET AL

MORTGAGE.—Reformation of.—Junior Mortgage.—A mortgagee may have his mortgage reformed, by the correction of a mistake in the description of the real estate intended to be mortgaged, as against a junior mortgagee, whose mortgage was taken, without notice of such mistake, as a security for an antecedent debt, without the surrender of any old security and without any new consideration moving between the parties, but merely to secure a new note given for the amount of old ones taken up.

From the Montgomery Circuit Court.

A. Thomson and *T. H. Ristine*, for appellant.

W. P. Britton, *M. W. Bruner*, *P. S. Kennedy* and *W. T. Brush*, for appellees.

WORDEN, J.—This action was brought by the appellant,

53	499
129	244
53	499
135	191
53	499
139	629
53	499
142	238
53	499
145	604
146	329
53	499
148	95
53	499
171	346

Busenbarke, Executor, *v.* Ramey *et al.*

as executor of James Busenbarke, deceased, against William P. Ramey and his wife, William Mount and Hattie McCune.

The complaint was in two paragraphs. The first alleged, in substance, that on October 23d, 1872, the plaintiff's testator lent to the defendant William Ramey the sum of one thousand dollars, and took his note therefor, payable one year after date, and a mortgage executed by Ramey and his wife on certain real estate described, to secure the payment thereof, which mortgage was duly recorded. That there was a mistake in the description of the property intended to be mortgaged, which mistake was fully described and set forth. That afterwards, viz., on June 9th, 1873, Ramey and his wife executed to Hattie McCune a mortgage on the same property intended to be described in the mortgage to the plaintiff's testator, to secure the payment of a debt which Ramey owed to Mount, and which existed long prior to the execution of the mortgage to the plaintiff's testator. That said Hattie McCune took no part in the transaction of the business, which was all done by Mount, the mortgage being executed to her at the request of Mount, she being a near relative of his. That Ramey is insolvent; and that at the time of the execution of the latter mortgage Mount had notice of all the facts in relation to the claim of the plaintiff's testator.

There were other allegations not necessary to be noticed.

The second paragraph was the same in substance as the first, except that it contained no allegation of notice to Mount.

Prayer for a reformation of the mortgage to the plaintiff's testator, its foreclosure, and for general relief.

A demurrer, filed by Mount and McCune, to the second paragraph, for want of sufficient facts, was sustained, and exception taken.

Mount and McCune then filed an answer in denial of the first paragraph, and Ramey and his wife filed an answer admitting the facts alleged in the complaint.

The issue was submitted to the court for trial, and the

Busenbarke, Executor, *v.* Ramey *et al.*

court found for the plaintiff against Ramey and wife, and that as against them he was entitled to have his mortgage reformed, but found against the plaintiff in favor of Mount and McCune, and that as against them he was not entitled to the reformation, and that the latter mortgage was a prior lien upon the premises.

Motion by plaintiff for a new trial overruled, and exception. Judgment. Appeal by plaintiff below.

The question arising upon the demurrer to the second paragraph of the complaint and the motion for a new trial is, whether the plaintiff, under the circumstances, is entitled to have his mortgage reformed and the mistake corrected, as against Mount and McCune, though Mount had no notice of the mistake at the time of taking the latter mortgage.

We are of opinion, upon an examination of the authorities, and upon principle, that he is entitled to the reformation.

By the averments of the second paragraph of the complaint, and by the evidence adduced upon the trial, it appears that the latter mortgage was given to secure an antecedent debt, which Ramey owed Mount.

Nothing was advanced by Mount or McCune upon the execution of the latter mortgage, nor were any old securities given up or surrendered.

It appeared upon the trial, by the evidence of Mount, that he had several notes on Ramey, and that the interest on them was computed, and a new note for the whole amount given him, in the name of Hattie McCune, and the mortgage to secure its payment.

It is settled, that a mistake in a mortgage will be corrected as against subsequent judgment-creditors. *White v. Wilson*, 6 Blackf. 448; *Sample v. Rowe*, 24 Ind. 208.

In *Flanders v. O'Brien*, 46 Ind. 284, which was decided after much reflection, and after a rehearing had been granted, it was held that such mistake in a mortgage could not be corrected as against the purchaser of a subsequent judgment, who had invested his money in the purchase of the judg-

Busenbarke, Executor, *v.* Ramey *et al.*

ment upon the faith of the apparent lien of the judgment upon the land.

The true principle, as we think, was applied in that case. The court said:

“The equity in favor of the mortgagee in such cases may be stronger than that in favor of the judgment plaintiff. The judgment plaintiff has not, probably, parted with his money on the faith of the apparent facts. But where the judgment has been sold and assigned to one ignorant of the mistake in the mortgage, and who has expended his money upon the faith of the rights of the parties, as they appear in the respective securities, it is difficult to see any superior equity in the mortgagee.”

It is urged by counsel for the appellees, that “between creditors who have equal equities there can be no relief for a mistake.” The proposition may be conceded. But the equities between these creditors are not equal. The plaintiff’s testator lent his money upon the faith of the security which he supposed he was obtaining. Mount invested nothing when he took his mortgage, and lost nothing by taking it.

But it is urged that Mount and McCune should be regarded as purchasers in good faith, for a valuable consideration, and, as such, protected against the reformation which was sought. The authorities, however, upon this point are clearly against the appellees.

In *Hare & W. Lead. Cas.*, vol. 2, p. 104, 3 Am. ed., it is said, that “it is equally well settled, * * * that, although a sale, vitiated by fraud, cannot be set aside in the hands of a *bona fide* purchaser, from the fraudulent vendee; yet, that no one can claim the benefit of this doctrine, who has not parted with value, or who has taken the goods as security for an antecedent debt; *Buffington v. Gerrish*, 15 Mass. 156; *Hodgden v. Hubbard*, 18 Vt. 504; *Poor v. Woodburn*, 25 Vt. 234; *Clark v. Flint*, 22 Pick. 231. In *Upshaw v. Hargrove, Adm’r*, 6 Sm. & M. 286, *Boone, Adm’r, v. Barnes*, 23 Miss. 136, and *Halstead v. The President, etc., of the Bank of Kentucky*, 4 J. J. Mar. 554, the same rule was applied to the

Busenbarke, Executor, v. Ramey *et al.*

conveyance of land by a debtor to a creditor, which was said not to render the latter a purchaser for value, unless something was given up or relinquished on the faith of the conveyance, or the transfer accepted in absolute payment or satisfaction for the debt.

“Similar decisions were made in *Donaldson v. The Bank of Cape Fear*, 1 Dev. Eq. 103, and *Bragg v. Paulk*, 42 Me. 502; and the conveyance of land as collateral security for a precedent debt held not to entitle the grantee to protection against prior equities.”

The case of *Dickerson v. Tillinghast*, 4 Paige, 215, went further than we need to go in this case, for there it was held, that, “to constitute a *bona fide* purchase, for a valuable consideration, within the meaning of the act, the purchaser must, before he had notice of the prior equity of the holder of an unrecorded mortgage, have advanced a new consideration for the estate conveyed, or have relinquished some security for a pre-existing debt due him. The mere receiving of a conveyance in payment of a pre-existing debt is not sufficient.”

The proposition that the receiving of a conveyance by way of mortgage to secure the payment of a pre-existing debt is not sufficient, is supported by the following additional cases: *The Manhattan Co. v. Evertson*, 6 Paige, 644; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Powell v. Jeffries*, 4 Scam. 387; *Morse, Assignee, v. Godfrey*, 3 Story, 364.

In the latter case, Mr. Justice STORY, in delivering the opinion of the court, p. 390, said:

“Mr. Chancellor WALWORTH, in *Dickerson v. Tillinghast*, 4 Paige R. 215, seems to have gone somewhat further, and to have held, that a transfer to a grantee in payment of a pre-existing debt, without giving up any security, or divesting himself of any right, or placing himself in a worse situation than he was in before, of an estate, upon which there was a prior unrecorded mortgage, of which the grantee had no notice, did not make him a purchaser, in the sense of the rule, for a valuable consideration; * * * * I do not

Busenbarke, Executor, *v.* Ramey *et al.*

say that I am prepared to go quite to that length, seeing, that by securing the estate as payment, the pre-existing debt is surrendered and extinguished thereby. But here, there was no such surrender or extinguishment or payment; and the general principle adopted by the learned chancellor is certainly correct, that there must be some new consideration, moving between the parties, and not merely a new security given for the old debts or liabilities, without any surrender or extinguishment of the old debts and liabilities, or the old securities therefor."

We need not determine what would have been the effect of an absolute conveyance of the property by Ramey and wife to McCune in payment and extinguishment of the debt which Ramey owed Mount. The conveyance was made by way of security only, for the old debt. McCune, it may be observed, is a mere volunteer, and can occupy no better position than could Mount, had the mortgage been made to him. No securities were surrendered or given up by Mount in the proper sense of that term. The taking up of the old notes and the giving of the new one for the total amount, were but a changing and consolidating of the evidence of the debt.

For these reasons, we are of opinion that the court below erred in sustaining the demurrer to the second paragraph of the complaint, and in overruling the plaintiff's motion for a new trial.

The judgment below is reversed, at the costs of Mount and McCune, and the cause remanded for further proceedings in accordance with this opinion.

• ON PETITION FOR A REHEARING.

PERKINS, J.—In this case, Ramey executed two mortgages; the first on the 23d of October, 1872, to James Busenbarke, to secure a loan of one thousand dollars, due one year after date. In this mortgage a mistake was made in the description of the property mortgaged.

Busenbarke, Executor, *v.* Ramey *et al.*

The second mortgage was executed on the 9th of June, 1873, by Ramey to Hattie McCune, to secure a note for two thousand eight hundred dollars, and was upon the same property, correctly described, as was the prior mortgage to Busenbarke, in which mortgage the property was erroneously described.

In a suit to foreclose the first mortgage, that given to Busenbarke, it was held by this court, in an opinion delivered by WORDEN, J., that the mistake in the mortgage, in describing the property, might be corrected and the lien of it established on the property, as against Hattie McCune, the subsequent mortgagee, on the ground that said McCune's mortgage was simply to secure a prior debt.

In the petition for a rehearing, it is admitted the decision made in the case is correct, if it be true in fact that the McCune mortgage was made to secure a prior debt.

It is insisted that, on the contrary, the record shows the McCune mortgage to have been given for a loan made at the time of the execution of the mortgage. This is a question of fact that must be settled by the evidence in the record. We copy all relating to it.

William P. Ramey testified: "I was owing William Mount, and he held a number of notes on me of different sums, and he wanted them made into one note and secured by mortgage. These notes were for money and interest of business transactions of some seven or eight years past. He brought all the notes to the store, and we counted up the interest and included all the debts in one note. He wanted the note and mortgage given to his niece, Hattie B. McCune. She was not present then or at any time, and never had anything to do with the business."

Hattie McCune testified: "I had no conversation with any one in regard to the business, except my uncle, Mr. Mount. I would not have reloaned the money to Ramey on the security of the mortgage given to me, had I known that Busenbarke held a mortgage on said lots."

William Mount testified: "I fetched down the notes to

Armstrong *et al.* v. Rockwood.

William P. Ramey's store, and his son, William H. Ramey, counted up the interest on them. Some of the notes held in her name" (McCune's), "and some in my name. The old man, William P. Ramey, his son, William H. Ramey, and myself were present. William H. Ramey counted up the interest on all the notes, and I told them to draw up a note for the whole amount, which was done and given to me in Hattie B. McCune's name. William P. then asked his son if he should give a mortgage to secure this note, on the brick house."

This is all the evidence on the point of the consideration of the mortgage of McCune. It shows that that mortgage was given to secure a prior debt. It shows that a new note was given for that debt, at the time of the execution of the mortgage; but the evidence does not show how long the notes exchanged for the new note had to run; it does not show that time of payment was extended a day by the new note; it may have been shortened. It does not appear that any new loan was made upon the execution of the McCune mortgage, or that time was extended for a moment on an old one.

The petition for a rehearing is overruled.

ARMSTRONG ET AL. v. ROCKWOOD.

58	506
158	549

PLEADING.—*Performance*.—Where a pleading is based upon an agreement, either as a cause of action or as matter of defence, performance or a sufficient excuse for non-performance of the stipulations to be performed by the party so relying on the agreement must be averred.

From the Vigo Circuit Court.

W. E. McLean and *I. N. Pierce*, for appellants.

M. M. Joab, for appellee.

Armstrong et al. v. Rockwood.

Howk, J. — Appellee, the payee, sued appellants, the makers of a promissory note. The note was dated July 14th, 1871, and was payable one year after date, with interest at ten per cent. per annum from date until paid. The suit was commenced in the court below on the 21st day of January, 1875.

Appellants answered in three paragraphs:

1. A general denial of the allegations of the complaint.
2. Payment in full, before the commencement of the action.

3. In abatement of the action, appellants said that the note sued on was given by them for money loaned by appellee to appellants, at the date of the note, on the terms therein stated; that, by mutual agreement of the parties, the time for the payment of the note was extended from year to year, until the 14th day of July, 1874; that in the month of July, 1874, and prior to the 14th day thereof, appellee and appellants entered into an agreement, by the terms of which appellee agreed to let appellants have the further use and loan of the amount of money evidenced by the note sued on, for the term of one year from said 14th day of July, 1874, at the same rate of interest stipulated in said note, in consideration whereof the appellants agreed to pay appellee the amount of the annual interest of said sum stated in the note, in advance, in such sums and at such times as required by appellee, and such other small sums of the principal of the note, from time to time, as appellee might require; and that, in pursuance of said agreement, appellants, from time to time, and prior to the commencement of this suit, paid to appellee, in such sums and at such times as required by her, the aggregate amount of one hundred and thirty-five dollars. And appellants prayed that the suit might abate, and for all proper relief. This paragraph was sworn to by one of the appellants.

There was a reply in denial of the second paragraph of the answer, and a demurrer to the third paragraph. This demurrer was sustained, and appellants excepted, and judg-

Tuley v. The City of Logansport.

ment was rendered in the court below, in favor of appellee, for the amount due on the note.

In this court, the only error assigned on the record is the decision of the court below sustaining the appellee's demurrer to appellants' answer.

It is not necessary, in this case, that we should pass upon the validity of the alleged verbal agreement, which is set forth in the third paragraph of appellants' answer. Whenever a party relies upon an agreement, either as cause of action or as matter of defence, performance or a sufficient excuse for the non-performance of the stipulations of the agreement to be performed by the party must be averred, or the pleading will be held insufficient on a demurrer thereto for the want of sufficient facts. In this case, by the agreement stated in the third paragraph of the answer, the appellants agreed, among other things, to pay the interest on the note in suit, in advance, and it was not averred that appellants had paid the interest in advance, nor was any excuse whatever given for such non-payment.

We hold, therefore, that the third paragraph of the answer was bad on demurrer, and that no error was committed by the court below in the decision of this cause.

The judgment is affirmed, with five per cent. damages, and costs.

TULEY v. THE CITY OF LOGANSPORT

CITY.—City Attorney.—Docket Fees.—Docket fees, to which, under section 30 of the act of March 14th, 1867, for the incorporation of cities (1 Rev. Stat. 1876, p. 280), a city attorney is entitled, in prosecutions commenced before the mayor or city judge, for violations of city ordinances, are not to be paid by the city, but are to be charged up as costs against the defendants, on pleas of guilty or on convictions on pleas of not guilty.

SAME.—Judgment Paid by Manual Labor.—Where persons convicted of vio-

Tuley v. The City of Logansport.

lations of ordinances of a city incorporated under said general law for the incorporation of cities, from whom docket fees are therefore due to the city attorney, are adjudged, in default of paying or replevying the judgments and costs, to pay the same by manual labor, and do, accordingly, work out the judgments and costs, under the provisions of section 20 of said law, the city does not thereby become bound to the city attorney for the docket fees thus paid by manual labor.

From the Cass Circuit Court.

J. T. Tuley, for appellant.

D. C. Justice, for appellee.

WORDEN, C. J.—Action by the appellant against the appellee. Complaint in five paragraphs. Demurrer to each for want of sufficient facts sustained, and exception. Judgment for defendant.

The demurrer exaggerates the number of paragraphs, for it is addressed severally to each paragraph, numbered from one to seven inclusive. Perhaps, however, there may have been two more paragraphs in the complaint, which were abandoned and therefore not sent up here.

We take the following statement of the substance of the different paragraphs from the brief of counsel for the appellant:

“In substance, the first paragraph states that Maurice Winfield was acting city attorney from July 26th, 1873, to November 3d, 1873, inclusive, and that he was entitled to one hundred dollars, docket fees during that period in cases prosecuted to final judgment for violations of city ordinances; that such fees were taxed up as costs in the cases; the defendants, having failed to pay or replevy judgments and costs, were committed to the county jail, and a work order issued to the street commissioner, as required by said section 20, directing him to work said defendants until the fines and costs were paid; that the street commissioner did work them until the fines and costs were paid; that the same were paid defendant; that said fees were, on January 29th, 1875, assigned by Winfield to plaintiff, who demanded same of defendant; avers a refusal, and money due and unpaid.

Tuley v. The City of Logansport.

“Second paragraph same as first, except it avers that the city judge committed parties to jail until they satisfied the fines, either by work and labor on the streets, or imprisonment inside the jail; that they did satisfy same by imprisonment, work and labor; and their discharge from custody in consequence of so paying same.

“The third paragraph avers, parties satisfied fines and costs by imprisonment, and in consequence of such payment were discharged from custody.

“The fourth paragraph alleges defendant is indebted to plaintiff in one hundred and sixty-eight dollars, for attorney’s fees in suits in favor of defendant and against parties for violations of city ordinances, as provided by section 30, *supra*; that such services were rendered by plaintiff as the acting deputy of Winfield; avers assignment of account, etc.

“The fifth paragraph avers that Winfield, as city attorney, prosecuted eighty persons; sixty pleaded guilty, and twenty not guilty. In the former, he was by law allowed a fee of two dollars, and in the latter four dollars, and for all two hundred dollars; avers assignment of fees to plaintiff; that such fees are due from defendant and unpaid to plaintiff.”

The counsel for the appellant, as we understand the printed brief, insists upon two propositions, which we will state inversely to the order in which we find them in the brief:

1. That the city attorney is entitled to the docket fees, which are to be paid by the city, and not by the defendants, in the prosecutions before the mayor or city judge. They say, speaking of the fourth and fifth paragraphs:

“Under these paragraphs we shall claim a right to the docket fees in the first instance, that the obligation to pay them is upon the appellee, and not the defendants in the city court, and that unless they be paid by the appellee they could not be collected from any one.”

In support of this proposition, the case of *Jewett v. Talbott*, 11 Ind. 298, is cited. We think the proposition entirely

Tuley v. The City of Logansport.

untenable. The 30th section of the act of March 14th, 1867, on the subject of the incorporation of cities, 1 Rev. Stat. 1876, p. 280, provides, that the city attorney "shall prosecute all actions in favor of the city, and defend all actions brought against such city for any cause, *but in no case shall the city be liable for costs.*"

The section then goes on to provide, that in prosecutions before the mayor or city judge, for violations of city ordinances, and on appeals in such cases, the city attorney shall be entitled to certain docket fees, differing in amount as the plea may be "guilty" or "not guilty."

The implication is irresistible that, as the city is not liable for costs, the docket fees are to be charged up as costs against the defendants in such prosecutions, on pleas of guilty, or on convictions on pleas of not guilty. The case cited from 11 Ind., *supra*, is not in point. There, as the law was construed, it was expressly provided that the docket fees should be paid out of the treasury, and there was no provision for their payment elsewhere.

The court said, in speaking of the statute:

"It specifically directs the docket fees allowed by law, as well as the annual salary of three hundred dollars, to be paid out of the treasury."

Here, there is not only no provision that the docket fees shall be paid out of the city treasury, but there is a direct provision that the city shall not be liable for costs, thus implying that they are to be paid by the parties convicted.

2. The appellant's other proposition, and the main one in the cause, is, that, where persons convicted of violations of the city ordinances, and from whom docket fees are due to the city attorney, are adjudged to work out the fine and costs, and do thus work them out, under the provisions of section 20 of the act, the city becomes equitably bound to the city attorney for the docket fees thus worked out for the city.

The section of the statute is in part as follows:

"If the penalty or forfeiture in which judgment is obtained

Tuley v. The City of Logansport.

is not paid or replevied, the defendant may be committed, for any period not exceeding thirty days, to the workhouse of such city, or, if such city have no workhouse, then to the county prison of the county in which such city is situated; and, in the latter case, it shall be the duty of the person having charge of such prison to receive such defendant and obey the judgment of the city judge or mayor's court in reference to him or her; and, in default of payment or replevy of such judgment and costs, the defendant, unless a female, may be adjudged and required to pay the same by manual labor in said workhouse or in the street, or other public works of said city, under the control of the street commissioner or marshal of such city, for which labor such defendant shall be allowed, on such judgment and costs, seventy-five cents per day. It shall be the duty of such street commissioner or marshal, or such other officer as the common council may direct, to work such defendant not less than six nor more than ten hours per day, according to the season, and each evening to return him to the custody of the keeper of such prison or workhouse; and upon the full payment, as aforesaid, of judgment and costs, such defendant shall be fully discharged," etc.

In examining this section, it is noticeable that two things must occur, before a party convicted can be put to working out the fine and costs.

1. He must fail to pay or replevy the judgment for fine and costs.

2. He must be adjudged to pay the same by manual labor, in the workhouse, streets, etc.

When the fine and costs are thus worked out, the defendant in such prosecution is entitled to be discharged, and he is no longer liable for the fine or any part of the costs.

Section 30, giving the city attorney docket fees, must be construed together with section 20, in part above quoted, so as to give effect to both. They constitute but parts of one entire statute. The city attorney is entitled to his docket fees, subject to all other provisions of the statute. One of

Powell v. Powell.

those provisions is, that in the cases provided for, the costs, including the docket fees, which would have been due the attorney if the judgment had been paid or replevied, may be adjudged to be worked out as provided for. We think it was not intended by the legislature that the city attorney should have the docket fees, thus worked out.

The defendants in such prosecutions are not liable for them, nor is there any provision requiring the city to make any payment to the city attorney.

The result of the two sections, taken together and so construed as to give effect to both, is to give the city attorney the docket fees provided for, except in the cases where the fines and costs may be adjudged to be worked out as provided for. The section giving docket fees may be read, in order to give effect to section 20, as if it contained, in itself, an exception of the cases where the fines and costs might be worked out, as provided for in section 20, and a provision that in such cases the docket fees, instead of going to the city attorney, should be worked out together with the fines and the residue of the costs.

We see no ground on which to hold the city liable.

The judgment below is affirmed, with costs.

POWELL v. POWELL.

DIVORCE.—Evidence.—Residence.—Where, in an action for a divorce, the residence of the petitioner is not proved as required in section 7 of the act of March 10th, 1873, regulating the granting of divorces (2 Rev. Stat. 1876, p. 326), the court has no power to decree a divorce.

SAME.—Alimony.—Custody of Children.—Judicial Discretion.—In an action for a divorce, the questions of the amount of alimony and the temporary custody of infant children of the marriage are matters largely within

53	513
138	259
53	513
140	436
141	307
53	513
153	89

Powell v. Powell.

the discretion of the court trying the cause; and the abuse of this discretion must be very clear, to justify the Supreme Court in interfering with its exercise.

From the Boone Circuit Court.

C. C. Galvin and *C. S. Wesner*, for appellant.

W. B. Walls and *J. Claybaugh*, for appellee.

Howe, J. — Appellee was appellant's *third* wife, and appellant was appellee's *third* husband. As the fruits of their former marriages, appellee had four children, and appellant had six children. And as a pledge of their mutual loves, appellee had borne one child to appellant, which child was, at the commencement of this suit, about two months old. And "still, they were not happy!" They were married on the 17th day of October, 1872; they lived together as husband and wife until the 25th day of October, 1873, when appellee left the appellant; and on the 13th day of November, 1873, the appellee filed her petition in this cause, in the court below, praying for a divorce from appellant, for the custody of their infant child, and for alimony.

The petition is quite lengthy, but the causes which appellee relied upon for a divorce may be briefly stated, as follows: the abusive and inhuman treatment of appellee by appellant; his failure and refusal to speak to or wait upon her during her confinement, when she was unable to help herself in or out of bed; his pushing and choking her at one time; his refusal to sleep with her; his cursing her and calling her opprobrious names; his failure and refusal to make any provision for her support, after she had been forced by his abuse to leave him; and the alleged fact that the appellant had been, ever since their marriage, an habitual drunkard.

To this petition appellant demurred, upon the ground that it did not state facts sufficient to constitute a cause of action; which demurrer was overruled by the court below.

It does not appear from the record that any answer was filed to the petition; but the parties appeared and submitted

the cause for trial to the court. The finding of the court below was, that appellee was entitled to a divorce from appellant, and to alimony in a specified sum, and to the custody of her infant child for two years, and to a specific allowance for the support of such child during that time; and judgment was entered accordingly.

Appellant, for written causes then filed, moved the court below for a new trial of this cause, which motion was overruled, and appellant excepted, and leave was given him to prepare and file his bill of exceptions within ninety days; and within the time allowed by the court, this bill of exceptions was signed and sealed by the court, and made part of the record of this cause. In this bill of exceptions, it is certified by the court below, that "this was all the evidence given in the cause."

Upon the record of this cause, errors were assigned by appellant, as follows:

1. The court below granted a divorce to appellee, when it ought not to have been done.

2. The court below erred in overruling appellant's demurrer to appellee's petition.

3. The court below erred in giving the custody of the infant child to appellee.

4. The court below erred in overruling appellant's motion for a new trial.

5. The court below erred in giving alimony to appellee.

6. The court below erred in allowing alimony in excess of what was warranted by the evidence.

In discussing these alleged errors, it is proper that we should say that appellant is in no condition to complain of the ruling of the court below on his demurrer to appellee's petition, for the reason that he did not except at the time to such ruling. As, however, the granting and refusal of divorces are matters of public policy, it is right we should add that, in our opinion, the petition states facts sufficient to constitute a good cause of action, for the reason that it charges appellant with "habitual drunkenness" and "cruel

Powell v. Powell.

and inhuman treatment" of the appellee. 2 Rev. Stat. 1876, p. 327, sec. 8, fourth and fifth causes for divorce.

The important question in this cause, for the consideration of this court, is presented by the fourth error assigned on the record, the alleged erroneous ruling of the court below on appellant's motion for a new trial. The overruling of this motion by the court below was excepted to at the time by appellant, and is now properly before this court for consideration and decision.

The written causes assigned by appellant for a new trial of this cause were these:

1. The finding of the court below was contrary to the law and evidence.

2. The finding and judgment of the court below were not supported or sustained by the evidence.

It is provided by the first sentence of the seventh section of the act regulating the granting of divorces, etc., approved March 10th, 1873, 2 Rev. Stat. 1876, p. 326, as follows:

"Sec. 7. Divorces may be decreed by the superior, circuit, and common pleas courts of this State, on petition filed by any person, who, at the time of the filing of such petition, is and shall have been a *bona fide* resident of the State for the last two years previous to the filing of the same, and a *bona fide* resident of the county at the time of and for at least six months immediately preceding the filing of such petition, which *bona fide* residence shall be duly proven by such petitioner to the satisfaction of the court trying the same, by at least two witnesses, who are resident freeholders and householders of the State."

It will be observed, from the language of this section, that the *bona fide* residence of the petitioner in the State for two years, and in the county in which the petition may be filed for six months at least, immediately preceding the filing of such petition, is a jurisdictional fact, which ought to be averred in a petition for divorce, and which must be duly proved by the petitioner, to the satisfaction of the court trying the cause, by at least two witnesses, who are resident

Krach *et al.* v. Heilman.

freeholders and householders of the State, *before* such court will have any power or authority to decree the divorce.

In this case, the appellee made the proper averments, in regard to her residence, in her petition. But it does not appear from the bill of exceptions, in which it is certified "was all the evidence given in the cause," that any evidence whatever, even tending to prove the *bona fide* residence of the appellee, either in county or State, was produced on the trial or in the progress of the cause before the court below, or that any witness, who was a resident freeholder and householder of the State, testified on any subject whatever, on the trial of this cause.

In our opinion, therefore, the court below erred in overruling appellant's motion for a new trial.

The only other questions presented for the consideration of this court by appellant's assignment of errors relate to the amount of alimony allowed and the temporary custody of the infant child. These matters are both, of necessity, largely within the discretion of the court below; and the abuse of that discretion must be very clear indeed, to justify this court in interfering with its exercise.

In the case now before the court, the alimony allowed was not unreasonable; and, from the evidence, we are unable to see why the custody of a female infant of the tender age of two months should not have been awarded to her mother for the short period of two years.

The judgment is reversed, and the cause remanded to the court below, with instructions to sustain the motion for a new trial, and for other proceedings.

KRACH ET AL. v. HEILMAN.

LIQUOR LAW.—*Act of 1873.—Section 8.—Compensation for Taking Care of Intoxicated Person.*—Section 8 of the act of February 27th, 1873, Acts 1873, Reg. Sess. 151, which provided that any person who should, by

Krach *et al.* v. Heilman.

the sale of intoxicating liquor, cause the intoxication of another, should be liable "to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person," must be construed as authorizing a recovery only for the time during which such person may have remained intoxicated.

SAME.—*Section 12.—Injury in Consequence of Intoxication.—Proximate Cause.*—

Where a person, by selling intoxicating liquor to another, caused the intoxication of the latter, so that he became insensible and unable to take care of himself, and while in that condition, in going home, lying down in his wagon in consequence of his intoxication, he received an injury from a barrel which was in said wagon, and, if he had not been intoxicated, he would not have received said injury, from which he died; *Held*, in an action by his widow, who by his death was injured in her means of support, against said seller, that she was not injured "in consequence of the intoxication," and was therefore not entitled to recover under section 12 of said act of 1873.

From the Vanderburgh Circuit Court.

A. Iglehart, B. Hynes and J. E. Iglehart, for appellants.

A. L. Robinson, C. Denby and D. B. Kumler, for appellee.

WORDEN, C. J.—Complaint by the appellee against the appellants in two paragraphs. Demurrer to each paragraph for want of sufficient facts overruled, and exception. Issue, trial by jury, verdict and judgment for plaintiff.

The complaint is as follows, viz.:

"Catherine Heilman complains of John Krach and Christian Stock, and says that on the 1st day of December, 1873, the said John Krach obtained a permit, in due form of law, to retail spiritous and intoxicating liquors, in quantities less than a quart, for one year from that date, at his store situated on the Petersburg road, in Scott township, in the county of Vanderburg, State of Indiana, about eight miles from the city of Evansville, and from that day to the present time he has been and still is engaged in that business. The plaintiff further avers that Edward Heilman, late of Warrick county, was for many (to wit, twelve) years next previous to his decease as hereinafter described, the husband of the plaintiff, and that during all that time they lived together as husband and wife, and that they became the parents of

Krach et al. v. Heilman.

seven children, the fruit of their marriage; that he was a farmer by occupation, and lived on a small farm in said county of Warrick, and that the plaintiff and the said children were dependent upon the said husband and father for their support; that he was an affectionate husband, a kind father and a good citizen, and had always been of sober habits, which the defendants well knew. The plaintiff further avers that, on the 31st day of December, aforesaid, the said Edward Heilman was in full life and in good health, and about thirty-five years of age, and was living happily on his farm with his family; that on the said day he was travelling on his return home from the city of Evansville (to which he had on that day been with his wagon and two-horse team), and on the evening of that day he stopped at the store of the said defendant John Krach, of whom the said Edward bought intoxicating drink, to wit, peach brandy, in small quantities called drinks, in all amounting to one pint, which the said Edward then and there drank in the store of the said Krach; and that the said defendant Christian Stock, being then and there present, sold to the said Edward a certain quantity of other intoxicating drink, to wit, whiskey, in small quantities called drinks, in all amounting to two gills, which the said Edward then and there drank, the said Stock then and there drinking with the said Edward; (that the said defendants, in selling the said liquors to the said Edward as aforesaid, were then and there acting in concert and with the design and intention of making him drunk), by means whereof the said Edward became and was drunk, so that he was not able to walk, stand or sit, and in consequence of which drunkenness he was laid in his wagon and hauled in that drunken condition, in the night of the said day, to his own home, his team having been driven by one of his neighbors, who himself was in a state of intoxication, which the defendants then and there well knew. The plaintiff further avers that, while the said Edward was lying in his wagon in that drunken condition, and while being driven to his house as aforesaid, he was severely and fatally injured

Krach et al. v. Heilman.

by means of a barrel filled with salt, in the same wagon, which fell over and struck the face and head of the said Edward with great force and violence, by means of which his face was frightfully cut and wounded, and his scalp bruised, and his skull fractured, and he was also greatly injured in other parts of his body, to wit, his shoulders, back, sides, while being so driven and hauled, which were also greatly bruised and wounded by the motion of the said wagon; that all of said injuries, wounds, cuts, and bruises were made while the said Edward was in his drunken and helpless condition, and within a short time, to wit, one hour, after he left the store and premises of the defendant Krach, as aforesaid. And the plaintiff further avers that the said fit of drunkenness was caused by the said intoxicating liquors, so sold by the said Krach and the said Stock to the said Edward Heilman, and drunk by him as aforesaid. The plaintiff further avers that the said Edward would not have been injured, wounded, cut and bruised but for the drunken and helpless condition aforesaid; and she further avers that on the night of the said day, he was brought to his home and family in the state of drunkenness and with the injuries and wounds already above described; and that by means of said drunkenness, and from the effects of said injuries, the said Edward became sick, lame and diseased, and so continued, lingering in pain and sickness, until the 13th day of March, 1874, when he departed this life in consequence of the injuries aforesaid, to the plaintiff's damage of five thousand dollars, for which she prays judgment.

"2d Par. The said plaintiff, further complaining of the said defendants, says that the said John Krach, on the 1st day of December, 1873, obtained a permit from the Board of Commissioners of the county of Vanderburgh to retail intoxicating liquors, and henceforth has been engaged in retailing said liquors. And plaintiff says she was, on the 31st day of December, 1873, the wife of one Edward Heilman, and so remained until his death, and is now his widow; that said Edward Heilman, at the time of the happening of

Krach et al. v. Heilman.

the injuries hereinafter set out, was a man of sober and temperate habits, and was not used to drink intoxicating liquors; yet the said defendants, on the 31st day of December, 1873, combined and confederated together to make said Edward Heilman drunk; and to that end said defendants pressed him to buy intoxicating liquors at the store of said Krach, and said defendants did then and there sell to said Heilman large quantities of peach brandy, whiskey, and other intoxicating liquors, and induced him by their persuasion to buy and drink the same, which, having done, the said Heilman became and was drunk, and entirely unable to take care of himself; and the said defendants put the said Heilman in his wagon, he being drunk and insensible, and procured another person, who was also drunk and was utterly incapacitated to take care of a drunken man, to drive said wagon to the home of said Heilman, distant four miles from said store; that defendants laid said Heilman in said wagon on his back, and placed a log of wood under his head, and directed said other person to haul him to his house; that while so being hauled, and being utterly unconscious, a hoop of a barrel, which was then in said wagon, becoming unloosened from said barrel, impinged in and upon the head of said Heilman, and entered the same behind one of his ears, and worked gradually into his head, and continued to lacerate, tear and penetrate his head, until he was taken from said wagon, being a period of one hour, thereby making a large and dangerous wound and hole in the head of said Edward Heilman, from which injuries so received said Edward Heilman died, after languishing in great pain for a period of three months; and plaintiff says that she was compelled to nurse, take care of and attend to said Heilman during that time, and that her services in that regard were worth the sum of five hundred dollars; that she had no means of support, except the labor of her said husband; that he was accustomed to and did labor on a farm, in order to support his family, and to save thereby one thousand dollars every year, and to apply said money to support the plaintiff and

Krach et al. v. Heilman.

their children, being seven in number; and that, by the death of her said husband, she has been damaged in the means of support in the sum of three thousand five hundred dollars; and that said sums of money are still due and unpaid; wherefore she asks judgment for five thousand dollars."

Error is assigned upon the ruling of the court upon the demurrer to each paragraph of the complaint, and we proceed to consider the questions thus raised.

The common law does not, on the facts alleged, give the plaintiff any right of action. Her right of action, if she have any, is based upon statute. The statute relied upon is the act of February 27th, 1873, to regulate the sale of intoxicating liquors, etc., Acts 1873, Reg. Sess., p. 151. The eighth section of the act is as follows:

"Any person or persons who shall by the sale of intoxicating liquor, with or without permit, cause the intoxication, in whole or in part, of any other person, shall be liable for and be compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, for every day he or she is so cared for, which sum may be recovered in an action of debt before any court having competent jurisdiction."

The twelfth section provides, that, "in addition to the remedy and right of action provided for in section eight of this act, every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, severally or jointly, against any person or persons who shall, by selling, bartering, or giving away intoxicating liquors have caused the intoxication, in whole or in part, of such person," etc.

The first paragraph of the complaint is not based at all upon the eighth section of the statute. Nor do we think the second paragraph makes out a case within that section.

Krach et al. v. Heilman.

The section must be construed to authorize a recovery by a party "who may take charge of and provide for such intoxicated person," only for the time during which such person may remain intoxicated. This is clearly implied from the language employed and the nature and object of the provision.

The allegation in the second paragraph, that for the period of three months, during which the deceased languished, the plaintiff was compelled to nurse and take care of him, does not bring the case within the eighth section; for it does not show that the intoxication continued during that time, or, indeed, any part thereof.

Each paragraph, then, must stand or fall upon the provisions of the twelfth section.

It cannot, under the allegations, be claimed that the plaintiff was in any way injured by the intoxicated person; and it remains to inquire whether the allegations show that she was injured in person or property or means of support, "in consequence of the intoxication" of her now deceased husband.

The substance of the case made by both paragraphs is, that the defendants furnished the deceased with intoxicating liquor, until he became drunk and insensible and unable to take care of himself; that in going home, lying down in his wagon in consequence of his intoxication, he received the injury from the barrel of salt, which injury he would not have received but for having been intoxicated, and from which injury he died.

One of the objections made to the complaint, passing over others, is, in our judgment, fatal to both paragraphs.

The rule of law is, that the immediate, and not the remote, cause of any event is regarded. We have seen that if the plaintiff is entitled to recover, it is because she was injured "in consequence of the intoxication" of the deceased. The immediate cause of the injury to the plaintiff was the death of the deceased. The remote cause may have been his intoxication, which led to his injuries, which injuries, in their turn,

Krach *et al.* v. Heilman.

led to his death. The plaintiff, therefore, was not immediately injured by the intoxication of the deceased.

The rule of law above stated is well enough settled. The difficulty that usually arises is in its application. It is sometimes difficult to determine what is the remote, and what the proximate cause of an event. But no difficulty of that sort arises in the present case. Here, according to the allegations, it is clear that the intoxication of the deceased was only the remote cause of the injury to the plaintiff, while his death was the immediate cause of such injury. For such injury, we think, on principle and well considered authority, the statute does not render the defendants liable to the plaintiff.

The case of *Tisdale v. Inhabitants of Norton*, 8 Met. 388, is in point. There, the town was obliged to repair the highway, and an action was given by statute to any person who might receive an injury by reason of any defect or want of repair. A gully had been washed out in the highway, rendering it impassable, and the plaintiff, in passing along with his conveyance, had to drive off the highway and into a pond, in order to pursue his journey. In passing through the pond, the plaintiff's conveyance was overturned, and he was thrown into the pond, in consequence of a hole in the bottom thereof. It was held that the case did not come within the statute, and that the plaintiff was not entitled to recover.

The case of *Marble v. The City of Worcester*, 4 Gray, 395, is also in point. The case arose under a statute similar to that involved in the previous case. There was a defect in the way, and a man with a horse and sleigh undertook to drive through that part of the way in which the defect existed. The sleigh pitched into a hole in the ice, which constituted the defect, and the horse, taking fright, ran, threw out the driver, detached himself from the sleigh, except, the shafts, or thills, and having run some fifty rods, ran against the plaintiff, who was then in the highway, and injured him, for which the action was brought. It was held

Krach *et al.* v. Heilman.

that the plaintiff was not entitled to recover, on the ground that, though the defect in the highway was the remote cause of the injury to the plaintiff, yet it was not the immediate cause, that being the collision between the horse and himself.

SHAW, C. J., in delivering the opinion of the court, said:

“The rule, *in jure, causa proxima, non remota, spectatur*, is of very general application in the law; and although more frequently stated and illustrated in the law of insurance, yet it is equally applied to other cases of like kind. The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of mystery. It was a maxim, we believe, of the schoolmen, ‘*causa causantis, causa est causati*.’ And this makes the chain of causation, by successive links, endless. And this perhaps, in a certain sense, is true. Perhaps no event can occur, which may be considered as insulated and independent; every event is itself the effect of some cause or combination of causes, and in its turn becomes the cause of many ensuing consequences, more or less immediate or remote. The law however looks to a practical rule, adapted to the rights and duties of all persons in society, in the common and ordinary concerns of actual and real life; and on account of the difficulty in unravelling a combination of causes, and of tracing each result, as a matter of fact, to its true, real and efficient cause, the law has adopted the rule before stated, of regarding the proximate, and not the remote cause of the occurrence which is the subject of inquiry.”

In *Crain v. Petrie*, 6 Hill, 522, it was said by NELSON, C. J., delivering the opinion of the court, that:

“To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of.”

Krach *et al.* v. Heilman.

The principle here involved was much considered in the case of *Ryan v. New York Central Railroad*, 35 N. Y. 210, which we cite, withholding any opinion as to whether it was correctly applied in that case.

The case of *Fairbanks v. Kerr*, 70 Pa. State, 86, is in point. It was there held, that "the general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be seen by ordinary forecast, and not for those which arise from a conjunction of his fault with circumstances that are of an extraordinary nature."

The defendants, in causing the intoxication of the deceased, could not have anticipated that on his way home he would be fatally injured by the salt-barrel. That was an extraordinary and fortuitous event, not naturally resulting from the intoxication. Suppose, by way of illustration, that a person, by reason of intoxication, lies down under a tree, and a storm blows a limb down upon him and kills him, or that lightning strikes the tree and kills him. Could it be said, in a legal sense, that his death was caused by intoxication? In the chain of causation, the intoxication may have been the remote cause of his death, because, if he had not been intoxicated, he would not have placed himself in that position, and therefore would not have been struck by the limb or lightning. In the case supposed, it may be assumed as clear, that the parties causing the intoxication would not be liable, under the statute, to the widow, as for an injury to her caused by the intoxication of the deceased. Yet there is no substantial difference between the case supposed and the real case here. See, on the subject of remote and proximate causation, the case of *Kelley v. The State*, ante, p. 311; also, *Durham v. Musselman*, 2 Blackf. 96.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrer to each paragraph of the complaint

THE INDIANAPOLIS SUN CO. v. HORRELL.

53	597
124	184
53	527
165	247

PLEADING.—*Name Importing that Defendant is a Corporation.*—Where the name by which a defendant is sued imports that the defendant is a corporation (as “The Indianapolis Sun Company”), the complaint need not expressly allege that the defendant is a corporation.

LIBEL. — *Pleading.* — *Publication.* — A complaint for libel alleged that the defendant, on, etc., at, etc., maliciously intending, etc., “did write, print and publish, and cause to be written, printed and published in a certain newspaper, called,” etc., a certain false, etc., libel, of and concerning the plaintiff, etc.

Held, on demurrer, that it was not necessary to allege that said newspaper was a circulating newspaper, or to aver in detail the manner or extent of the publication, and that the publication was sufficiently alleged.

SAME.—*Damages.*—For a libel charging that the plaintiff was a recently-released penitentiary convict, damages in the sum of eight hundred dollars were held not excessive.

SAME.—*Malice.*—A libel must be malicious, but malice may be inferred from its wrongful and intentional publication.

From the Marion Civil Circuit Court.

Buchanan, Williams & Whitehead, for appellant.

J. S. Harvey, B. K. Elliott and A. C. Ayers, for appellee.

PERKINS, J.—Albert J. Horrell, the appellee, brought an action in the Marion Civil Circuit Court, charging, that “the Indianapolis Sun Company,” the appellant, on the 8th day of August, 1874, at, etc., maliciously intending, etc., “did write, print and publish, and cause to be written, printed and published, in a certain newspaper, called the ‘Indianapolis Sun,’ a certain false, scandalous and malicious libel, of and concerning the said plaintiff” (appellee), “which false, scandalous and malicious libel is as follows, to wit:

“ ‘It is positively asserted that one Horrell’ (the plaintiff meaning), ‘a city detective, employed by the city’ (meaning the city of Indianapolis, and that said plaintiff was a policeman of said city), ‘is a recently-released penitentiary convict,’ thereby, then and there, meaning and charging,” etc.

The defendant appeared and demurred to the complaint, “for the reason that said complaint does not state facts sufficient to constitute a cause of action.”

The Indianapolis Sun Co. v. Horrell.

The demurrer was overruled, and exception taken.

The defendant answered in two paragraphs:

1. The general denial.
2. Matter in mitigation.

The plaintiff moved to strike out the second paragraph of the answer. The motion was overruled. He then demurred to the paragraph, and the demurrer was overruled. A reply in denial followed.

Jury trial; verdict for plaintiff, for eight hundred dollars, and judgment, over a motion for a new trial, on the verdict.

The reasons assigned in the motion for a new trial were:

1. Erroneous instructions to the jury.
2. Excessive damages.
3. Verdict not warranted by the evidence.

The errors assigned in this court are:

1. The court erred in overruling the demurrer to the complaint.
2. The court erred in overruling the motion for a new trial.

In her brief in this court, the appellant, the Sun Company, says: "The defects in the complaint intended to be reached by the demurrer are: 1st. There is no allegation in it that 'The Indianapolis Sun Company' is a corporation. 2d. There is no allegation in it that the 'Indianapolis Sun' is a circulating newspaper; in fact, no allegation in the complaint that the libel was ever published."

As to the first alleged defect in the complaint. It has always been the law in this State, that a plaintiff, suing in a name importing that it is a corporation, need not expressly aver the fact that it is such.

In *Harris v. The Muskingum Manufacturing Co.*, 4 Blackf. 267, the objection was made, that the complaint did not aver that the plaintiff was a corporation.

The court, BLACKFORD, J., delivering the opinion, said:

"There is no ground for this objection. The name itself implies that the plaintiffs are a corporation."

This decision has been followed down to this time. Now,

The Indianapolis Sun Co. v. Horrell.

it is very difficult to see why the same rule should not govern, when a party is sued by a name importing that it is a corporation, as when it sues by such name. Suing or defending by such name impliedly alleges that it is a corporation.

In New York, the well settled rule is the same as in Indiana, viz., that a plaintiff, suing in a name importing that it is a corporation, need not aver in its complaint that it is a corporation. And in *Lighte v. The Everett Fire Ins. Co.*, 5 Bosw. 716, the rule was applied in a suit against a party by a name importing that it was a corporation. The judge said:

“But it being established that a name carries with it the assertion of a fact, I can see no reason for not applying the same rule to defendants.”

We do not cite this case as authority, but because it accords with our own view of the proper application of the rule as to plaintiffs.

We proceed to the second point sought to be raised by the demurrer to the complaint, viz., that the libel is not shown to have been published.

It is averred in the complaint, that the appellant, The Indianapolis Sun Company, did write, print and publish, and cause to be written, printed and published, in a certain newspaper called the “Indianapolis Sun,” etc. It is claimed that the complaint should have gone further, and added that the “Sun” was a newspaper of general circulation, etc.

The objection made, that the libel is not shown to have been published, is groundless.

Chitty, in the first volume of his work on Pleading, p. 421, says:

“The declaration must show a publication of the libel or slander; but any words that denote a publication are sufficient. After verdict, an allegation that the defendant printed and caused to be printed a libel in a newspaper, was held to be sufficient.”

Swan, in the first volume of his Practice, an accurate

The Indianapolis Sun Co. v. Horrell.

work, in a note on p. 558, lays it down, that "the declaration must show a publication; but the word 'published' is not absolutely necessary, and the words 'printed and caused to be printed' have been holden sufficient."

One, at least, of the leading cases on this point is *Baldwin v. Elphinston*, 2 Wm. Blackstone, 1037. The declaration contained two counts. The first charged the defendant with "printing and publishing, in the St. James' Chronicle, a libel," etc. The second charged him with "printing, and causing to be printed," a libel, etc. It was objected, after verdict, that the second count did not aver a publication.

DE GREY, C. J., delivered the unanimous opinion of the court:

"We are all of opinion to affirm the judgment. * * * * There are various modes of publication, and no technical words are necessary to describe it. * * * * Printing a libel may be an innocent act; but, unless qualified by circumstances, shall, *prima facie*, be understood to be a publishing. It must be delivered to the compositor, and the other subordinate workmen. Printing in a newspaper (as laid in the declaration) admits of no doubt upon the face of it. It shall be intended a publication, unless it be shewn that the newspaper so printed by the defendant was suppressed, and never published."

But the complaint in this case avers, as two material facts, that the libel was printed and published. To publish, means to make publicly known, to proclaim to the public, etc. It was not necessary that the complaint should aver, in detail, the manner or extent of publication. It was necessary that it should aver that the libel was published. It would depend upon the evidence whether the averment was true in fact. The allegations in this complaint made it good on demurrer.

The averment of publication, in the complaint, was sufficient, both at common law and under the code. See Abbott's Pleadings under the New York code, p. 331.

We proceed to the objection that the damages are exces-

sive. The judgment of the jury, not of the court, is to determine the just measure of damages. But it must be their judgment, unbiased by prejudice, uninfluenced by corruption or undue means; and the damages may be so enormous as to raise the inference that they were not assessed by such impartial, honest judgment, and justify the court in setting aside the verdict for excessive damages. The damages awarded by the jury in this case were eight hundred dollars.

To aid us in coming to a conclusion on this point, we have looked into the cases in our own court for precedents.

In *Clarkson v. M' Carty*, 5 Blackf. 574, which was an action for libel, the damages found by the jury were one thousand four hundred dollars. Held not excessive.

In *Sanders v. Johnson*, 6 Blackf. 50, an action for slander, the damages were two thousand seven hundred and thirty-six dollars. Held not excessive.

In *Guard v. Risk*, 11 Ind. 156, an action for slander, they were seven hundred and seventy-five dollars. Held not excessive.

In *M'Intire v. Young*, 6 Blackf. 496, an action for slander, the damages were one thousand dollars. Held not excessive.

In *Alexander v. Thomas*, 25 Ind. 268, an action for slander, the damages were one thousand one hundred dollars. Held not excessive.

In *Iseley v. Lovejoy*, 8 Blackf. 462, a case of slander, the damages were six hundred and thirty-seven dollars. Held not excessive.

In *Dunn v. Hall*, 1 Ind. 344, the damages were five hundred dollars. Held not excessive.

But it is claimed that erroneous instructions by the court contributed to swell the damages found by the jury. Only three of the instructions are in the record. We cannot say, therefore, how far those in the record may have been modified by others given and not incorporated in the record. We, however, are unable to see wherein those given and appearing in the record are erroneous without qualification.

Driskill v. The Board of Commissioners of Washington County.

The court, in the first instruction in the record, told the jury, that "the plaintiff is entitled to recover compensatory damages, at least; that is, such sum as the jury shall determine to be a full compensation to him for the injury he has sustained from the publication."

In the third instruction, the court told the jury:

"If the publication was made without malice in fact, the the plaintiff's damages should be carefully limited to his just and full compensation."

Counsel for appellant contend that the instruction should have used the words "fair and reasonable," instead of the words "just and full" compensation. The words suggested by the counsel would have been suitable and proper, and had they been used, the instructions would have been none the less correct than they now are, and the amount of damages assessed could hardly have varied a single mill from the amount in the verdict rendered under the instructions given.

We cannot disturb the verdict on the weight of the evidence.

The libel must have been malicious, but malice may be inferred from its wrongful publication, intentionally made. We see no error in the case.

The judgment is affirmed, with costs.

DRISKILL v. THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY.

PRINCIPAL AND SURETY.—*Notice of Surety Requiring the Institution of Suit.*—

A surety upon a contract in writing, on which the right of action has accrued, cannot avail himself of the remedy provided by sections 672 and 673 of our code of practice, by giving notice in writing to an attorney of the creditor or obligee directing such attorney forthwith to institute an action upon the contract.

Driskill v. The Board of Commissioners of Washington County.

From the Washington Circuit Court.

H. Heffren, for appellant.

F. L. Prow, for appellee.

Howe, J.—The appellee, as obligee, sued the appellant and one Daniel B. Driskill, as obligors in a penal bond given to secure the payment to appellee, or their agent of the three per cent. fund, of a certain sum of money, at a certain time. Appellant demurred to appellee's complaint, for a want of sufficient facts. This demurrer was overruled, and appellant excepted. Appellant then answered the complaint in three paragraphs. Appellee demurred separately to the second and third paragraphs of the answer, upon the ground, as to each of said paragraphs, that it did not state facts sufficient to constitute a defense to the action. These demurrers were severally sustained by the court below, and to each of said decisions appellant excepted. Appellee dismissed its action as to said Daniel B. Driskill; there was a trial by the court below, and a finding against the appellant for the amount due on the bond, and judgment entered accordingly.

In this court appellant has assigned on the record the following errors:

1. Overruling appellant's demurrer to appellee's complaint.
2. Sustaining appellee's demurrer to the second paragraph of appellant's answer.
3. Sustaining appellee's demurrer to the third paragraph of appellant's answer.

The only questions presented to this court for consideration and decision, by the first and third of the alleged errors, relate to the validity of the bond sued on, and the power and authority of the appellee to loan money upon and accept of such a bond. In the case of *Baker v. The Board of Commissioners of Washington County*, ante, p. 497, the bond in suit is almost identical in its terms with the bond sued on in this action; and the same questions as those here pre-

Driskill *v.* The Board of Commissioners of Washington County.

sented were fully considered by this court in that case and decided adversely to the appellant. Following the authority of the case cited, we hold, in this case, that the court below did not err, either in overruling appellant's demurrer to appellee's complaint, or in sustaining appellee's demurrer to the third paragraph of appellant's answer.

The second alleged error presents a question as to the sufficiency of the facts stated in the second paragraph of appellant's answer to constitute a defence to the action.

It is averred in the second paragraph of the answer, that appellant was only a surety upon the bond sued on by appellee, which fact appellee, at the time of the execution of the bond, well knew; that appellant never received, directly or indirectly, any of the money for which said bond was executed; that the bond became due on the 19th of March, 1864; that appellant, on the 22d of March, 1875, notified Fred. L. Prow, the attorney of the appellee, in writing, that he was only security for his co-defendant, Daniel B. Driskill, and directed said attorney to institute proceedings at once upon said bond for its collection, and that he would stand responsible no longer; that at the same time, in said written notice, he informed said Fred. L. Prow, attorney as aforesaid, that said Daniel was making preparations to leave the county; that said Daniel remained in the county for the space of twenty days, during which time appellee made no attempt to have process served on him, nor did the appellee commence, or attempt to commence any proceeding against said Daniel, until the 3d day of June, 1875; that the total amount due appellee, on the 22d day of March, 1875, was one hundred and twenty-four dollars, which was within the jurisdiction of a justice of the peace; wherefore, the appellant said, that the appellee was "guilty of gross and wilful negligence."

It is evident that the appellant, in this second paragraph of his answer, has attempted to frame a defence to the action which would be good under the requirements of sections 672 and 673, of our practice act.

Driskill v. The Board of Commissioners of Washington County.

Section 672 provides as follows:

“Sec. 672. Any person bound as surety upon any contract in writing for the payment of money, or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract.” 2 R. S. 1876, p. 276.

In the paragraph of appellant's answer now under consideration, the written notice did not require the creditor or obligee in the bond sued on to institute an action upon the contract; but instead thereof, the notice mentioned in this paragraph was to Fred. L. Prow, who is described as the appellee's attorney, and directed him, and not the appellee, to institute proceedings on the bond. It is clear, we think, that the written notice described in this paragraph of the answer is not such a notice as the section quoted requires to be given. The remedy given by sections 672 and 673 of our code of practice to sureties upon written contracts is purely a statutory remedy, and has never been regarded, in this State, as a part of the common law. *Halstead v. Brown*, 17 Ind. 202. The surety who desires to avail himself of this remedy must do just what section 672, in plain terms, requires him to do; he must, by written notice, require the creditor or obligee to institute an action upon the contract. In our opinion, the notice in this case was clearly insufficient, and, therefore, the demurrer to the second paragraph of the answer was properly sustained.

We find no error in this cause.

The judgment of the court below is affirmed, with ten per cent. damages, at the costs of the appellant.

Young v. The State, *ex rel.* Converse.

YOUNG v. THE STATE, EX REL. CONVERSE.

BASTARDY.—*Support of Child by Another than the Mother.*—Where the mother of a bastard child, by a legal and proper arrangement with a third person, which has gone into operation, has become released from her obligation to support said child, and has ceased to support it, she has no right to call further upon the putative father to aid in its support. And where a third person supports such child, not as discharging a duty of the mother on her neglect to discharge it, or as an act of humanity simply, but under a contract voluntarily made upon a consideration, such third person is not entitled to receive, in addition, statutory compensation for supporting such child as a bastard.

SAME.—*Judgment Where Child has been Apprenticed.*—The mother of a bastard child, by deed duly executed, relinquished said child, until it should arrive at the age of eighteen years, to a certain orphan asylum, in consideration that said asylum would support and furnish a home for the child until it should reach that age, empowering said asylum, if it should see fit to do so, to cause said child to be adopted by some suitable person, or bound out till of age to such a person. Afterwards, and within two years from the birth of the child, the mother commenced a prosecution for bastardy against the putative father; pending which prosecution, said asylum, pursuant to said deed, by an article of indenture, apprenticed said child to a stranger, who under said article took and retained the child, whose maintenance and education, in consideration of its services, were secured by said article, until it should arrive at the age of eighteen years. Upon a verdict that the defendant in said prosecution was the father of said child, the court rendered judgment that the defendant pay for the support of the child a certain sum in instalments, etc., making the instalments payable to the person to whom the child had been apprenticed, to be used by him in the support, etc., of the child.

Held, that the judgment was erroneous; that the court should not have adjudged the payment of any sum to the person to whom the child was apprenticed, but should have merely awarded a just compensation to the mother for the time during which she supported the child before she relinquished it to said asylum.

From the Marion Civil Circuit Court.

J. C. Green, J. C. Pearson and J. S. Campbell, for appellant.

J. K. Jones, for appellee.

PERKINS, J.—Prosecution against Young for bastardy. Prosecution sustained in the court below. Appeal to this

Young v. The State, *ex rel.* Converse.

court. A bill of exceptions purports to contain all the evidence given on the trial of the cause.

Mary E. Converse, the relatrix, was the mother of the bastard child. It was born on the 11th day of October, 1874. Mary was a poor girl, and for a year and four months had supported herself and child by washing; when, on the 7th of February, 1876, in consideration that the Indianapolis Orphan Asylum, of Marion county, Indiana, would support and furnish a home for her said child, till it became of the age of eighteen years, she, by deed duly executed, relinquished it to that institution till it should arrive at the age mentioned, empowering said asylum, in the deed, if it should see fit so to do, to cause said child to be adopted by, or bound out till of age to, some suitable person, etc.

Pursuant to the covenants contained in said deed, and by virtue of the deed itself, the asylum received the custody and possession of the child from the mother, and on the 12th of April following, an article of indenture was entered into by the parties thereto, which we here copy:

“This indenture, made this 12th day of April, 1876, by and between the Indianapolis Orphan Asylum, a corporation existing under and by virtue of the laws of the State of Indiana, and Hannah T. Hadley, as president of the board of directors of the Indianapolis Orphan Asylum; of the county of Marion, and State of Indiana, parties of the first part, and Edward P. M. Kitson, of Indianapolis, county of Marion, State of Indiana, witnesseth, that the said parties of the first part, in consideration of the covenants and agreements of the party of the second part, herein mentioned, have and by these presents do put and bind Lizzie Young Converse, aged one year, October 11th, 1875, who is an orphan child, voluntarily abandoned by her parents, and now an inmate of the asylum of the said Indianapolis Orphan Asylum, situate in the county of Marion, from the date hereof, until she attains the age of eighteen years, unto the said party of the second part; that the said parties of the first part give the said party of the

Young v. The State, *ex rel.* Converse.

second part all the rights, power and authority over the said Lizzie Young Converse and her service and custody during said period, which, by the laws of said State, a master has over an indentured apprentice, and which the said parties of the first part, or either of them, can give under and by virtue of the act of incorporation of said corporation (formerly named 'The Widows and Orphans' Asylum of Indianapolis) and the amendments thereto, subject to the provisions of this indenture; and that the party of the second part, in consideration of the foregoing act and deed of the parties of the first part, covenants and agrees that he will now take the said Lizzie Young Converse, carefully keep and rear her, until she attains the age of eighteen years, and during said period will provide for her in sickness and in health, and supply her with suitable food and clothing; will teach her to read and write the English language, and to know and practice the general rules of arithmetic, 'including the double rule of three inclusive,' and will, if by the said party shall be deemed best, teach her some useful trade or occupation; will instil into her mind principles of morality and good conduct, and when she attains the age of eighteen years, give her five dollars, a good bed and bedding, and two suits of suitable clothing; that he will not assign this indenture or transfer the service or custody of said child; and that for any failure of the party of the second part to perform said agreements and covenants, or any of them, the said president of the board of directors of the said The Indianapolis Orphan Asylum, upon such failure, may, at the option of such president, at any time, assume and take the custody of said child for the remainder of said period; and the said party of the second part, upon the declaration of such option, shall have no right or authority whatever over said child or her service, but shall be liable in damages to the president of said board of directors of said corporation, for the use of said child, for the and every breach of all and singular his agreements herein, collectible without any relief from valuation or

Young v. The State, *ex re.* Converse.

appraisement laws; and that, for the full and true performance of all and singular his covenants and agreements aforesaid, the party of the second part hereby binds himself, his heirs, executors and administrators.

“In witness whereof,” etc.

This instrument was duly executed and acknowledged, and under it said Kitson took and still retains said child as a member of his household.

On the 24th of February, 1876, seventeen days after said Mary, the relatrix, had transferred her child to the orphans' asylum, and forty-seven days before that asylum had apprenticed it to Kitson, but within two years from its birth, this prosecution for bastardy, against Young, was commenced.

On the 17th of May, 1876, the jury returned their verdict in the case, that William A. Young was the father of said bastard child. On the 2d day of June, 1876, the court rendered judgment on the verdict, as follows: “That the defendant pay for the support of said bastard child five hundred dollars, in instalments of one hundred dollars each, the first to be paid on the 1st day of July, 1876, and the others annually afterwards; that in default of paying or securing,” etc., “the defendant be committed to jail,” etc., “that he pay the costs,” etc. The judgment proceeds: “And it having been shown to the court, by evidence, that the said bastard child, mentioned in the complaint herein, has been apprenticed by articles of indenture, duly executed, to Edward P. M. Kitson; it is by the court further adjudged, that the said instalments, as they become due, and the same are hereby made payable to said Edward P. M. Kitson, to be used by him in the support, care and maintenance of said child.”

No question is made as to the legality of the disposition of the child by the mother and the orphan asylum, and we make none.

We cannot reverse this case upon the weight of evidence as to the paternity of the child, nor for any error of the court in its rulings prior to the judgment for the payment

Young v. The State, *ex rel.* Converse.

of the instalments of money for the support of the child. But that that judgment is erroneous, must strike every one at first blush. It gives the mother nothing for supporting the child during the first year and one-third of its existence, and it gives the whole five hundred dollars to Kitson, who is entitled to none of it, because, by the contract, the article of indenture, by virtue of which he took and now holds the child, he is to receive the services of the child when they may be of much value, as compensation for maintaining it during the period of its comparative helplessness.

It may aid us in getting a clearer view of this question, if we consider, for a moment, the powers of a mother of a bastard child. In the mother of such a child are centered all the powers of both the parents of a legitimate child. She is entitled to its custody, care and government. On her is the burden of its support. She may, or may not, prosecute the putative father, to obtain from him aid in supporting it; but if she do so, this gives the putative father no right to its possession or government. 1 Bl. Com., Sharswood, p. 458, note; 2 Kent Com. 215.

Contracts, then, for support, of apprenticeship, of hiring, etc., which the father of a legitimate child may make, the mother of an illegitimate child may make. When she made her contract, then, with the orphans' asylum, apprenticing, or "putting out" her child to it, till it was eighteen years of age, in consideration that that institution should support it till that time, it was a contract that she was competent to make; and it provided for the support of her child, relieved her entirely of that expense and care, and rendered it unnecessary for her to call on the putative father for further aid in that behalf. It rendered the child self-supporting. This contract enured to the benefit of the putative father, as well as to the mother. In this case, had the child died, both the mother and the putative father would have been freed from its support. And we assert the proposition, that when, by a legal and proper arrangement with a third party, which has

Young v. The State, *ex rel.* Converse.

gone into operation, the mother has become released from her obligation to support her bastard child, and has ceased to support it, she has no right to call further upon the putative father to aid in its support. And when a third person, as in this case, supports such child, not as discharging a duty of the mother, on her neglect to discharge it, nor as an act of humanity simply, but under and pursuant to a contract, voluntarily made upon a consideration, such person is not entitled to receive, in addition, statutory compensation for supporting such child as a bastard. This would be compelling the father to make such person a mere gift, to pay for the support of the child, where its support was already provided for.

The statute enacts, 2 Rev. Stat. 1876, p. 659, sec. 15: "Such court shall, on such verdict and judgment, make such order as may seem just, for the securing such maintenance and education to such child, by the annual payment to such mother, or if she be dead, or an improper person to receive the same, to such other person as the court may direct, of such sums of money as may be adjudged proper," etc.

Here, the mother is not dead, and there is no evidence that she was, or is now, an improper person to receive the money. This statutory provision, by its very terms, shows that it applies to cases where the mother is still liable to support the child, to cases where no provision has been made by which, as in this case, both mother and putative father are relieved of its support.

The court should have awarded a just sum to the mother, for the sixteen months she supported the child; and, under the facts appearing in this case, we do not see what further allowance could have been made. But, as change of circumstances may sometimes justify a modification of the judgments in bastardy cases, we reverse the judgment in this cause fixing the amount to be paid for the support of the child, the person to whom it is to be paid, the instalments, etc., but not the judgment that the defendant is the

Kennedy v. The State.

father of the bastard child, and direct the court below to be governed in the premises by this opinion, leaving it the right to hear further evidence as to the state and condition of all the parties, if deemed advisable so to do.

KENNEDY v. THE STATE.

JURISDICTION.—Judge.—Change of Venue.—Attorney Appointed to Act as Judge.—The act of March 9th, 1875 (2 Rev. Stat. 1876, p. 120), should be construed in connection with section 4 of the act of March 1st, 1855 (2 Rev. Stat. 1876, p. 11); and where, a change of venue having been granted in a criminal action in a criminal court because of an objection to the judge, an attorney is appointed to try the cause under the first proviso of said act of 1875, upon the agreement of the parties entered of record, such appointment should be in writing, and should be entered on the order book, and the appointee should take an oath to support the constitution of the United States and the constitution of this State, and to faithfully discharge the duties of such office; and where objection has been made in such court to the authority of such appointee to act as judge in such cause, the record on appeal to the Supreme Court must show that these requirements have been complied with; otherwise, the judgment will be held void for want of authority in the judge.

From the Clarke Criminal Circuit Court.

C. H. Test and J. Coburn, for appellant.

C. A. Buskirk, Attorney General, for the State.

BUSKIRK, J.—The appellant was convicted in the court below of murder in the second degree, and, over motions for a new trial and in arrest, judgment was rendered on the verdict.

The first question presented by the assignment of errors and discussed by counsel requires us to decide whether the court below, as constituted at the time of the trial, possessed jurisdiction and power to try and determine the cause.

Kennedy v. The State.

A change of venue was granted by the regular judge on account of his alleged bias and prejudice. The judge, then, in compliance with the provisions of the act of March 9th, 1875, made a list of three attorneys, residing in Floyd county. The names of two of them were struck off by the parties, and thereupon the remaining one was appointed to try said cause, and the cause was set down for trial on a day named. At the time so set, such appointee failed to attend and preside at the trial of such cause. The record then proceeds as follows:

“And now, by consent of parties, it is agreed that D. C. Anthony, Esq., a practicing attorney, residing in Floyd county, in the State of Indiana, be and he is hereby selected and agreed upon to try this cause, and by consent of parties this cause is to be set down for trial before D. C. Anthony, on Monday, the 9th day of August, 1875. It is therefore ordered and adjudged by the court that this cause be and is hereby set down for trial before D. C. Anthony, Esq., a practicing attorney of Floyd county, Indiana, on Monday, the 9th day of August, 1875.”

At the time and place named in the above order, the Hon. D. C. Anthony appeared and assumed jurisdiction of the cause; and thereupon, the appellant denied the jurisdiction of the court, and objected to being tried, on account of the irregularity and illegality of the appointment of the said judge; but the objection was overruled, and the appellant excepted.

Two objections are urged against the regularity and legality of such appointment:

1. That it does not appear from the record that the regular judge of said court appointed the said D. C. Anthony in writing, and under his hand and seal; and,

2. That it does not appear from the record that the said D. C. Anthony took an oath to support the constitution of the United States and the constitution of this State and to faithfully discharge the duties of such office.

Kennedy v. The State.

The first proviso to the act of March 9th, 1875, is as follows:

“*Provided*, That if the parties to such cause shall agree upon an attorney to try such cause, such attorney shall be appointed by the judge of said court to try such cause, but on failure of such parties to agree upon an attorney to try such cause, the judge of such court shall call some other judge, or appoint a regular practicing attorney of good standing of any county, other than the one in which said cause is pending.”

It is settled that, without the consent of the parties, the judge possessed no power, under the above proviso, to appoint an attorney to try this cause. *Barnes v. The State*, 28 Ind. 82.

The above agreement of the parties entered of record empowered the court to appoint the said D. C. Anthony to try the cause. The question arises whether the court did make an appointment of such person, and the solution of that question depends upon whether such appointment should have been made in writing under the hand and seal of the judge. The act of 1875 requires the judge to make an appointment, but it does not provide how such appointment shall be made.

There being nothing in the act of 1875 prescribing the manner in which the appointment shall be made, it becomes our duty to examine other acts relating to the same subject, and to construe such acts *in pari materia*. Buskirk Practice, 353, 358, 365.

The 4th section of the act of March 1st, 1855, provides:

“If, from any cause, any judge of a circuit court shall be unable to attend and preside at any term of said court, or during any day or part of such term, such judge, or in his absence, or when he shall be unable to make such appointment, the clerk, auditor and sheriff of the proper county, or a majority of them, may appoint, *in writing*, any other judge of a court of record of this State, or any attorney thereof eligible to the office of such a judge, to preside at such

Kennedy v. The State.

term, or during any day or part of such term. Such written appointment shall be entered on the order book of such court, and such appointee shall, after being sworn, if he be not a judge of a court of record, conduct the business of such court, subject to the same rules and regulations that govern circuit courts in other cases, and shall have the same authority, during the continuance of his appointment, as the judge elect, or making such appointment." 2 G. & H. 9.

By the above section, the appointment must be in writing. The appointment must be entered on the order book of the court. The appointee, if an attorney, must be sworn, which oath should be entered on the appointment. Such has been the uniform practice. The appointee has the same authority as the judge elect, or the one making the appointment. For the time being, he is the judge of the court and invested with the same power and authority as a regular judge.

Where a cause is tried, in whole or in part, before any other than the regular judge, the record, whenever objection is made in the court below to the authority of such person, must show legal authority in such person to act as such judge; but where no objection is made in the court below, all objections to his authority will be deemed in this court to have been waived. *Miller v. Burger*, 2 Ind. 337; *Negley v. Wilson*, 14 Ind. 215; *Seymour v. The State*, 15 Ind. 288; *Redwine v. The State*, 15 Ind. 293; *The Board, etc., v. Coates*, 17 Ind. 150; *Cooper v. Lingo*, 15 Ind. 67; *Danneburg v. The State*, 20 Ind. 181; *Feaster v. Woodfill*, 23 Ind. 493; *Barnes v. The State*, 28 Ind. 82; *Kambieskey v. The State*, 26 Ind. 225; *Watts v. The State*, 33 Ind. 237; *Hyatt v. Hyatt*, 33 Ind. 309; *Winterrowd v. Messick*, 37 Ind. 122.

It is provided by section 4 of article 15 of the constitution of this State, 1 G. & H. 54, that "every person elected or appointed to any office under this constitution, shall, before entering on the duties thereof, take an oath or

Kennedy v. The State.

affirmation, to support the constitution of this State and of the United States, and also an oath of office."

It is provided by section 1 of the act of June 9th, 1852, 1 G. & H. 163, "that every officer and every deputy, before entering on his official duties, shall take an oath to support the constitution of the United States, and of this State, and that he will faithfully discharge the duties of such office."

It may be that the foregoing sections of the constitution and the statute do not apply to and govern in the appointment of an attorney to act as a judge and try a cause, but they afford very conclusive evidence that the framers of our constitution and the law-making power regard an oath to support the federal and state constitutions and an oath of office essential to the due administration of justice and the proper discharge of official duties. It would be monstrous to hold that an attorney, where the objection is made, may sit in judgment upon the life, liberty, character and property of a citizen without having taken the oath prescribed by the constitution and the statute. The 4th section of the act of 1855 expressly requires the appointment to be in writing, that it shall be entered on the order book, and that the appointee, if an attorney, shall be sworn. That act is in force, there being no repealing clause to the act of 1875, and there being no repugnancy between the two acts; and the latter should be construed in connection with the former. The legislature, in an enactment of a law, are presumed to have knowledge of prior and existing laws, and to legislate in reference thereto.

We therefore hold that the appointment of D. C. Anthony should have been in writing, that it should have been entered upon the order book, that he should have taken an oath as above prescribed, and that, his authority to act as judge having been denied in the court below, these facts should appear in the transcript; and these things not appearing, we hold that he possessed no power or authority to act as judge in the trial of this cause; and hence, the

Morford v. White.

judgment is void, for want of authority in the judge presiding.

The judgment is reversed, and the cause is remanded for a new trial; and the clerk will immediately notify the warden of the southern prison of the reversal of the judgment herein.

MORFORD v. WHITE.

JUSTICE OF THE PEACE.—Pleading.—Action.—The complaint in an action commenced before a justice of the peace, by its statement of facts, showed a cause of action in favor of the plaintiff against the defendant in replevin and in trover. No writ of replevin was asked or issued, and no bond was filed, but the demand of relief and the writ issued were as in assumpsit for the value of the goods.

Held, that it was proper to treat the action, not as a suit for the recovery of the possession of the goods, but as an action for their value, the tort being waived.

From the Spencer Circuit Court.

C. L. Wedding and *R. G. Evans*, for appellant.

W. W. Medcalf and *L. D. Abbott*, for appellee.

PERKINS, J.—Suit commenced before a justice of the peace. The complaint in the cause is substantially as follows:

“Lee W. White complains of J. P. Morford, and says that plaintiff is the owner and entitled to the immediate possession of the following personal property, viz.,” then follows a schedule of the property, with the value affixed to each item. Among the items of property are inserted a few items of account for work and labor. The complaint proceeds: “All of the aggregate value of one hundred and ninety-one dollars and ninety-one cents; all of which defendant now has in his possession, and unlawfully and wrongfully withholds from plaintiff; that none of the prop-

Morford v. White.

erty has been taken upon any writ of execution, or levied upon for any tax," etc.; "that plaintiff has demanded possession of defendant, which demand the defendant has refused to comply with," etc.; "wherefore, plaintiff prays judgment for one hundred and ninety-one dollars and ninety-one cents, his damage, and all proper relief."

The complaint is sworn to.

This summons was issued:

"To any constable," etc. "You are commanded to summon J. P. Morford before me at my office," etc., "to answer Lee W. White in a complaint wherein he claims the sum of one hundred and ninety-one dollars and ninety-one cents, and of this writ make due return," etc. It was returned, "served by reading," etc.

The cause went by appeal to the circuit court.

In that court, the defendant moved that the items of account for work and labor be struck out of the complaint. The motion was overruled, and exception taken. The defendant then moved that the suit be dismissed for want of jurisdiction in the justice, no bond having been filed before the issue of summons, and because the complaint did not state facts sufficient to constitute a cause of action. Motion overruled, and exception taken. A demurrer was then filed to the complaint, assigning for cause want of sufficient facts. The demurrer was overruled. The cause was tried by a jury, on the general issue, and a verdict returned for plaintiff for one hundred and nine dollars. A motion for a new trial was overruled, and judgment was rendered on the verdict.

On the trial, the plaintiff introduced testimony tending to show that the defendant was wrongfully in possession of the property itemized in the complaint, that it was the plaintiff's property, its value, and appropriation to his own use by the defendant; to which the defendant objected, for the reasons thus stated in the bill of exceptions: "that if the plaintiff's complaint constituted any cause of action, it was an action to recover the possession of personal property,

Morford v. White.

replevin, a proceeding under section 71, 2 G. & H., 598, and that the only course which could be pursued was to seize the property, if it could be found, and that any evidence as to the property being used by Morford or converted by him was inadmissible, until it was shown by the officer's return or other competent evidence, that the property could not be found; that the first step was to show the issuing of the writ, the search for the goods, the failure to find them, before evidence," such as that being offered, could be heard; that it was irrelevant, etc.; "but the court overruled the objection, saying the suit was an action on account," etc.

The defendant was acting, in the trial of the cause, upon one theory of it, the court upon another. The defendant treated it as an action of replevin, the court as an action of assumpsit for the value of the goods wrongfully detained, the tort being waived.

The statement of facts in the complaint showed a cause of action in replevin, and in trover; but the demand of relief and the writ issued in the cause were in assumpsit for the value of the goods. No writ of replevin was asked or issued, and no bond was filed. The plaintiff did not seek to obtain possession of the goods.

We think the cause was properly treated as a suit for the value of the goods, and not for the recovery of the goods themselves. It was a case in which the party might, by law, waive the tort, and sue in form *ex contractu* on the facts, for the value of the property. *Jones v. Gregg*, 17 Ind. 84, and cases cited. We think, as the action was commenced before a justice of the peace, the complaint was sufficient. The rule in such action is, that "any statement of facts, not having the legal requirements of a regular complaint, will be deemed a sufficient cause of action, provided enough be shown to bar another action for the same demand, and apprise the defendant of the nature of the claim." *Indiana Central R. W. Co. v. Leamon*, 18 Ind. 173.

The erroneous view taken of the character of the suit by

McCormick *et al.* v. Spencer.

the defendant led him to regard as errors rulings, which, under the view taken of the character of the action by the court (as we hold the true one), were correct.

The judgment is affirmed, with five per cent. damages and costs.

McCORMICK ET AL. v. SPENCER.

58 550
150 655,

PRACTICE. — *Form of Judgment.* — A person cannot object to the form of a judgment against him for the first time in the Supreme Court.

From the White Circuit Court.

A. W. Reynolds, E. B. Sellers, W. C. Wilson and J. H. Adams, for appellants.

R. Gregory, J. Dague and C. D. Jones, for appellee.

DOWNEY, C. J.—This was an action by the appellee against the appellants. The complaint is long and need not be set out in full. The plaintiff and the defendant McCormick had mutual accounts against each other, and agreed to submit the adjustment of them to arbitrators mutually chosen. The arbitrators made an award of a small amount in favor of McCormick. Spencer had also assigned or conveyed to McCormick certain property, with which to pay his creditors. McCormick had paid certain judgments against Spencer, and had them assigned to himself, and then he had assigned them to McAfee, his co-defendant.

The complaint in this case sought to set aside the award of the arbitrators, on the ground of the intoxication of Spencer when the submission was entered into and the award made, and, for other reasons, to set aside the assignments of the judgments to McAfee, and to recover judgment against McCormick for the amount claimed to be due from him to Spencer on a settlement of their accounts.

McCormick *et al.* v. Spencer.

McCormick answered:

1. A general denial.
2. Set-off.
3. Setting up the submission and award.

Reply in denial. McAfee answered by a general denial. Trial by jury. Verdict for the plaintiff. Motions of the defendants for a new trial and in arrest of judgment overruled, and judgment on the verdict.

Two errors are alleged:

1. Overruling the motion for a new trial.
2. Refusing to arrest the judgment.

It is urged that the only relief the plaintiff was entitled to was to have the submission and award set aside, and the assignment of the judgments to McAfee cancelled: We do not think so. The complaint set forth the cause of action against the defendant McCormick in favor of the plaintiff on his account, to which McCormick pleaded a set-off. It was proper that the jury should find, and that the court should render judgment for, the amount due the plaintiff upon a settlement of the accounts between them.

There was nothing in the complaint and verdict to justify the rendition of a judgment for money against McAfee. The complaint did not ask judgment for money against McAfee, but only against McCormick. But he made no objection to it, nor any separate motion to arrest it, or any motion to amend or change it. It was probably an oversight in rendering judgment for the amount of money found due from McCormick against both him and McAfee. The question must, however, be presented to the court below, and an exception taken to its action, before there is anything for us to decide. As the case stands, we must affirm the judgment. Nothing is presented under the first assignment.

The judgment is affirmed, with three per cent. damages and costs.

Opinion filed May term, 1876; petition for a rehearing overruled November term, 1876.

Decker v. The State, *ex rel.* Harrell.

DECKER v. THE STATE, EX REL. HARRELL.

BASTARDY.—Evidence.—Interest of Relatrix. — Instruction to Jury.—On the trial of a prosecution for bastardy, the court, in instructing the jury in relation to the consideration to be given to the interest of the relatrix, in determining her credibility as a witness, stated, “that she has an interest in establishing the paternity of her bastard child, and also in recovering a judgment for money for the maintenance of said child. And of such recovery, if any,” she “gets nothing, and has no interest other than that arising from her relationship to the bastard child, such recovery being solely for the support and maintenance of said child.”

Held, that the last sentence, when considered in connection with the former portion of the instruction, could not mislead the jury, and that the instruction, taken as a whole, was not erroneous.

From the Clay Circuit Court.

A. T. Rose, J. J. Stephenson, S. M. McGregor and J. Tressel, for appellant.

W. W. Carter and S. D. Coffey, for appellee.

WORDEN, C. J.—Prosecution, by the appellee against the appellant, for bastardy. Trial by jury, resulting in a verdict and judgment for the plaintiff below.

The appellant has assigned error, raising but two questions, viz.: First, whether the verdict was sustained by the evidence; and, second, whether the court erred in giving a certain charge to the jury.

With regard to the first question, it may be observed, that the testimony of the relatrix, taking it to be true, clearly and unequivocally made out the case. But it is claimed that her story was improbable in itself, and that she was impeached and contradicted by the testimony of other witnesses.

The case was one in which there was simply a conflict of evidence, and we cannot, under the well established practice, disturb the conclusion arrived at below, upon the evidence.

The instruction complained of is as follows:

“This is a prosecution in the name of the State of Indiana, on the relation of Martha E. Harrell, against William Decker, to recover for the maintenance of the bastard child

Decker v. The State, *ex rel.* Harrell.

of the relatrix. Interest in the result of a suit does not disqualify as a witness, but such interest may be considered by you in determining the credibility of the witness, and the weight to be given to his or her testimony. That the defendant, William Decker, is interested in the result of the suit, is patent. The relatrix, Martha Harrell, is also interested, in this, that she has an interest in establishing the paternity of her bastard child, and also in recovering a judgment for money for the maintenance of said child. And of such recovery, if any, Martha Harrell gets nothing, and has no interest other than that arising from her relationship to the bastard child, such recovery being solely for the support and maintenance of said child."

It is claimed that the charge was incorrect as to the interest of the relatrix in the action, and, therefore, that the proper basis was not given to the jury by which to judge of the credence that should attach to her evidence.

In the case of *McCullough v. The State, ex rel., etc.*, 14 Ind. 391, it was held, that "in cases of this sort, the prosecuting witness, being the mother of the illegitimate child, is clearly interested in the event of the suit; because, in the event of a conviction, the defendant is adjudged the father of the child, and stands charged with its maintenance and education; but should he be acquitted, the witness, being its mother, would, of course, be obliged to maintain and educate her own child. This, then, is an interest that directly affects the credit of the witness, and, in this respect, her credibility is, in our opinion, necessarily in question before the jury; hence, it was error in the court to refuse so to instruct them."

A different ruling was had in the case of *Dailey v. The State, ex rel., etc.*, 28 Ind. 285, where it was held that the relatrix in such case had no direct interest in the result of the suit.

But in *Keating v. The State, ex rel., etc.*, 44 Ind. 449, the case in 28 Ind., *supra*, was overruled on this point, and that in 14 Ind., *supra*, followed.

Holloway v. The State.

But the charge given, it seems to us, was substantially correct. It informed the jury that the relatrix was interested in establishing the paternity of the child, and in recovering a judgment for money for its maintenance. This is, in substance, the interest stated in the case above cited from 14 Ind.

The charge goes on, to be sure, to state, that, if money was recovered, the relatrix would not get it, and that she had no other interest than that arising from her relationship to the child, the recovery being solely for the support and maintenance of the child. This part of the charge, taken in connection with the preceding, could not have misled or have been misunderstood by the jury. The court, doubtless, meant, and the jury must have understood, that the relatrix would not be entitled to the money in her own right, or for her own benefit, but that her interest in it grew out of her relationship to the child. Her relationship to the child gave her, as long as she was living and a proper person to receive the money, a right to the annual payments, for the maintenance and education of the child. 2 Rev. Stat. 1876, p. 659, sec. 15.

The judgment below is affirmed, with costs.

HOLLOWAY v. THE STATE.

CRIMINAL LAW. — Grand Jury. — Presumption. — The Supreme Court, on appeal in a criminal prosecution by indictment, will presume, where the contrary does not appear, that the grand jury which found the indictment was legally impanelled and sworn.

SAME. — New Trial. — Misconduct of Juror. — Evidence. — Where a motion for a new trial in a criminal action is based upon alleged misconduct of a juror, in falsely stating, on his examination under oath as to his competency as a juror, that he had not formed or expressed any opinion as to the guilt or innocence of the defendant, and, such alleged misconduct being

53	554
128	466

53	554
137	350

53	554
147	379

53	554
165	679

53	554
167	233

Holloway v. The State.

controverted, the evidence, either oral or written, offered on this point to the court in connection with the motion, is conflicting, the question of such alleged misconduct should be determined upon the weight of the evidence; and the Supreme Court will respect the conclusion arrived at, as it does the decision of a question of fact upon conflicting evidence in a civil action.

From the La Porte Circuit Court.

M. K. Farrand and *Osborn & Calkins*, for appellant.

C. A. Buskirk, Attorney General, and *J. A. Crawley*, Prosecuting Attorney, for the State.

Howk, J.—Appellant and one Newton Holloway were jointly indicted, in the court below, for an assault and battery, with the intent to kill and murder one Henry J. Finley. There was a joint motion, made by the parties indicted, to quash the indictment, which motion was overruled by the court below, and to this decision an exception was saved. And upon arraignment, a plea of not guilty was interposed to the indictment by the defendants; and they having demanded separate trials, the appellant was first tried, by a jury. This trial resulted in a verdict that appellant was guilty of the assault and battery as charged, and not guilty of the felonious intent, and his punishment was assessed at a fine of one thousand dollars and imprisonment in the county jail for one month.

Appellant then moved the court below to set aside the verdict and grant him a new trial, which motion was overruled, and to this decision appellant excepted. And appellant then moved in arrest of judgment, and this motion was also overruled, and appellant excepted; and the judgment was entered upon the verdict, from which this appeal is now prosecuted in this court. A bill of exceptions, containing the evidence on the trial, was duly filed and is properly in the record.

In this court, appellant has assigned the following errors:

1. In overruling appellant's motion to quash the indictment.

Holloway v. The State.

2. In overruling appellant's motion to set aside the verdict and grant him a new trial.

3. In overruling appellant's motion in arrest of judgment

In this court, appellant has failed to assign any reasons why either his motion to quash the indictment or his motion in arrest of judgment ought to have been sustained; and there was no reason stated in either of said motions, to indicate to the court below, or to this court, the grounds upon which the motion was made. We may well conclude, therefore, that appellant does not rely, for a reversal of this judgment, upon either the first or third of the alleged errors; and we consider these errors, if any such exist, as waived by the appellant. True, it is said by appellant's counsel, that "the record fails to show that the grand jury was empanelled, sworn and charged, and consequently that the court had no jurisdiction to put the defendant upon trial;" and again, that "the court erred in overruling the motion in arrest of judgment, for the same reason." This is all that was said, in appellant's brief, in reference to either the first or third alleged errors; and it is very evident, we think, that even this much was not said to the court below, on either of these motions. If it be true that the record fails to show that the grand jury was empanelled, sworn and charged, it is equally true that the record does not show that the grand jury was not empanelled, sworn and charged. In this case, we will presume, the contrary not appearing, that the grand jury was legally empanelled, sworn and charged. *Bell v. The State*, 42 Ind. 335, and *Long v. The State*, 46 Ind. 582.

The second alleged error of the court below is the overruling of appellant's motion to set aside the verdict and grant him a new trial. The causes assigned in this motion were the following:

1. The verdict of the jury is contrary to law.
2. The verdict of the jury is contrary to the evidence.

Holloway v. The State.

3. The court admitted illegal testimony to the jury over objection, setting out the testimony objected to at length.

4. For misconduct of one of the jurors, tending to prevent a fair and due consideration of the case, in this, to wit, that Theodore Beck, one of the jurors in this cause, before he was empanelled as such juror, had expressed an opinion, in substance, that if a jury was obtained, such as the juror had previously been on, the said jury, including himself, would send the prisoner who did the shooting, including the defendant, to the penitentiary; that when the said Theodore Beck was called on said jury, he was sworn to answer such questions as might be put to him, as to his competency as such juror, and, in answer to the question whether he had formed or expressed any opinion as to the guilt or innocence of the defendant, said that he had not formed or expressed any opinion whatever; whereas, in truth and fact, he had formed and expressed an opinion, as appeared by the affidavits of A. B. Austin and others, filed with and made part of the motion.

It will be observed, that several causes are assigned by appellant for a new trial; but his learned counsel say, in their brief argument of this case, in this court: "There is one upon which we rely, and which we now point out specially;" and then they "point out specially" the fourth cause assigned in the motion for a new trial. Not a word is said by counsel in support of the first three causes for a new trial; and not only so, but they pointedly inform us that they rely upon the fourth cause for a new trial. And from this the implication is irresistible, that appellant not only does not rely upon, but virtually waives, the first three causes assigned in the motion for a new trial. In this respect, we will pursue the course indicated by appellant and his counsel; and regarding the first three causes for a new trial as virtually waived, we will now consider and determine whether or not appellant, upon the hearing of the matter presented to the court below by the fourth cause assigned

Holloway v. The State.

in the motion for a new trial, was entitled to a new trial of this cause.

This fourth cause for a new trial was submitted to the court below, for its decision, upon the affidavits of Alexander B. Austin and appellant and of appellant's attorneys, in support of this cause, and upon the counter-affidavit of Theodore Beck, the juror charged with misconduct. The affidavits of appellant and of his attorneys, though properly filed, did not support the main question, which was the alleged misconduct of the juror named in the fourth cause for a new trial. So far as this question was concerned, the only evidence before the court below is contained in the affidavit of Alexander B. Austin, on one side, and, upon the other side, the affidavit of the juror charged with the misconduct.

Before considering these affidavits and the action of the court below thereon, it should be premised that the affidavits of appellant and of his attorneys show that, before the juror in question was sworn with the jury to try this cause, he was sworn to testify as to his competency as a juror, and stated under oath that he had not formed or expressed any opinion of the guilt or innocence of the appellant, touching the charge in the indictment mentioned; and as to these points the affidavit of the juror does not contradict the other affidavits.

The affidavit of Alexander B. Austin stated, in substance, that, before the commission of the offence charged in the indictment, he had been on the petit jury with Theodore Beck, one of the jurors in this case; that soon after the commission of said alleged offence, affiant met said Beck in the city of La Porte, and that said Beck then referred to the circumstance of the shooting, which was the same one upon which appellant had just been tried in this case; that affiant then remarked, in substance, that shooting ought not to be tolerated in neighborhood quarrels; and thereupon said Beck remarked, in substance, that if a jury was obtained, such as the one on which he and affiant had previously served, they,

Holloway v. The State.

meaning said jury, including himself, would send said persons, who did the shooting, meaning the appellant and his brother, Newton, to the penitentiary; that this conversation was had in the city of La Porte, shortly after said trouble had occurred, and made a very decided impression on affiant's mind, that said Beck had formed the opinion, from what he had heard and from the conversation he and affiant then had, that appellant and his brother ought to be sent to the penitentiary for shooting said Henry J. Finley.

On the other side, the affidavit of Theodore Beck stated, in substance, that he was the same Theodore Beck mentioned in said Austin's affidavit, and who sat upon the jury in the trial of this case; that he had no recollection of having had any such conversation as is mentioned in said Austin's affidavit; but that if he had any conversation with said Austin, touching the said shooting, it was altogether of a general character, to the effect that any person who would shoot another in any ordinary quarrel ought to be sent to the penitentiary; and that he was positive he had no conversation with said Austin relative to or based upon the facts in this cause, because he had no knowledge whatever as to what the facts really were, until he learned them from the evidence, upon the trial of this cause; and that, in fact, he had not, at the time of being empanelled as a juror in this cause, any opinion as to the guilt or innocence of appellant, because he had no knowledge of any facts upon which to base an opinion as to that matter.

It is the law in this State, that if a juror, on his examination under oath as to his competency as a juror, should falsely state that he had not formed or expressed any opinion as to the guilt or innocence of the defendant in the particular case, and the falsity of such statement was not known to the defendant at the time the jury was empanelled and sworn to try the case, then the juror would not be competent, and such misconduct on his part would be a good and sufficient cause for setting aside the verdict of the jury and granting a new trial of the cause. *Rice v. The State*, 16 Ind.

Holloway v. The State.

298, and *Croy v. The State*, 32 Ind. 384. And such also seems to be the law in Ohio. *Busick v. The State*, 19 Ohio, 198.

If, however, as in this case, the alleged misconduct of the juror should be controverted, and the evidence, either oral or written, offered on this point in the court below, should be conflicting, as it is in this case, then the question would arise, and does arise in this case, should the matter of the alleged misconduct of the juror be determined by the court below upon the weight of the evidence?

In *Romaine v. The State*, 7 Ind. 63, DAVISON, J., in discussing the question now under consideration, used this language:

“On the hearing of these motions, there was, it will be seen, an obvious conflict between the testimony on the part of the defendant and that produced by the State. But the inquiry presented to the court did not involve the guilt of the accused; it was in effect a mere incidental issue, one proper to be decided according to the weight of evidence. It was competent for the circuit court, in the case before it, to reconcile the conflict, and weigh the testimony as in the trial of civil cases. That court has heard the witnesses, observed the manner in which they testified, and, upon a pure question of fact, has given a decision which is not plainly erroneous. Hence we are not inclined to disturb its conclusions.”

In addition, we may safely presume in this case, from the fact that both the witnesses had been jurors in the court below, that that court had personal knowledge of the character, reputation and credibility of each of them; and therefore we are unwilling to disturb the conclusions of the court below on the point in question.

We do not find any error in the record of this cause, and therefore the judgment of the court below is affirmed at the costs of appellant.

 Krutz v. Craig, Administratrix.

KRUTZ v. CRAIG, ADMINISTRATRIX.

53	561
184	574

NEW TRIAL.—*Application for, When and How Made.*—An application for a new trial in a civil action cannot be made except by motion, upon written cause filed at the time of making the motion, and the application must be made at the term at which the verdict or decision is rendered, except it be for cause discovered afterwards; and the court cannot, without the agreement or waiver of the parties, grant time beyond the term to make the application, for a cause other than one discovered afterwards. But when a trial is pending at the close of the term, the court may proceed with it until it is concluded, and the additional time thus required will be held to be within the legal term.

PARTNERSHIP.—*Suit Against Surviving Partner by Personal Representative of Deceased Partner.*—A complaint by the administrator of the estate of a deceased partner, against the surviving partner, to recover the value of assets of the partnership, which the defendant has refused to account for, misapplied and converted to his own use, should contain proper traversable averments that the partnership debts have been paid, that the affairs of the partnership have been finally settled, and that the shares of the partners have been ascertained, and should show a demand made, or a proper excuse for not making a demand, before the bringing of the action.

FRAUD.—*Rescission of Contract.*—*Diligence.*—An unexplained delay of over four years in disaffirming an agreement was held fatal to an action to rescind the agreement on the ground of fraud.

EVIDENCE.—*Receipt.*—*Contract.*—A receipt is a written acknowledgment of having received money or a thing of value, without containing any affirmative obligation upon either party to it,—a mere admission of a fact in writing; when it contains stipulations which amount to a contract, it must be governed by the law of contracts, and can be avoided only as contracts are avoided.

From the Switzerland Circuit Court.

S. Carter, W. R. Johnston, J. A. Works, J. D. Works and C. E. Walker, for appellant.

H. W. Harrington and J. B. McCrellis, for appellee.

BIDDLE, J.—The complaint in this case alleges the following facts, to wit:

The plaintiff, as administratrix of Joel Craig, deceased, late of said county, complains of the defendant, and says that said defendant and said Joel Craig, in his lifetime, in Octo-

Krutz v. Craig, Administratrix.

ber, 1840, entered into a copartnership, at said county, to carry on a general merchandising business for an indefinite period of time; that said Craig invested in said firm, as capital, at the time of its formation, the sum of two thousand one hundred and fifty-seven dollars, and the said Krutz the sum of six hundred and ninety-seven dollars and twenty-nine cents, as appears from a memorandum in writing, executed by them June 17th, 1846, a copy of which is filed as an exhibit; that by the terms of said partnership, Krutz was to do the active management of the business, and the principal buying and selling; that said partnership was carried on until it was dissolved by the death of Craig, in 1867; that said firm was prosperous, and made large profits, which came into the hands of Krutz, who, in the year 1846, invested thereof the sum of four hundred dollars in eight and sixty-four hundredths acres of land in the county of Shelby, and State of Tennessee, for which land he received a deed of conveyance in his own name from one Chauncey Ives and wife, on the 26th of January, 1846, a copy of which is made an exhibit, and that the land was so purchased with the partnership funds of said firm; that on the 2d day of June, 1859, said Krutz sold said land for six thousand and forty-eight dollars, and conveyed the same to one James C. Jones, and received the purchase-money therefor; that Krutz wholly failed to account to said firm for said six thousand and forty-eight dollars and said four hundred dollars, but kept the same concealed from said Joel Craig, his copartner; that said Krutz, on the 30th day of May, 1859, purchased with the funds of said partnership from Jacob Seasongood, B. Mayberge, Max Hellman, Philip Heidelbach, Marden Heidelbach and their wives, the undivided two-thirds of one thousand four hundred and forty acres of land situate in what was known as the Delaware tract in the State of Kansas, and described by section, township and range, as shown by an exhibit; and that he had purchased, previously, the undivided one-third from B. Mayberge and wife; that said Krutz has never accounted for said lands or the

Krutz v. Craig, Administratrix.

proceeds thereof; that they were worth, at the time the partnership was dissolved, ten thousand dollars, and the defendant has converted the same to his own use; that the defendant, during the existence of said partnership, at divers times, purchased a large quantity of real estate in the State of Kansas with the funds of said partnership, and took conveyances for the same in his own name, and never accounted for the same to said Joel Craig; and that the same was worth at the time of his death the sum of one hundred and fifty thousand dollars; said lands and deeds being described in a schedule made part of the complaint; that after the death of said Joel Craig, September 28th, 1868, the plaintiff and one S. H. Stewart, as administrators of said estate of Joel Craig, made a settlement of said decedent's business with said Krutz, which embraced all their business transactions except what is hereinbefore alleged; that at the time of said settlement, she and said Stewart did not know that said Krutz had not accounted for said real estate and the proceeds thereof, purchased by him with partnership funds, and the said Krutz concealed the fact from them; he had the possession of all the books and papers belonging to said firm, and the said administrators had no means of knowing of the existence of the facts hereinbefore alleged, which plaintiff discovered since the date of said settlement; that by the terms of said copartnership, the said Joel Craig was entitled to two-thirds of the profits of said business, and the said Krutz to one-third; that said Craig was entitled, at the time of his death, to two-thirds of the value of said lands then unsold and of the proceeds of the lands said Krutz had sold, his share of which amounted to one hundred and fifty thousand dollars, which the defendant unjustly withholds from the plaintiff, together with a large amount of interest thereon.

Prayer for an account, judgment for one hundred and fifty thousand dollars, and general relief.

At a subsequent term of the court, the appellee filed a second paragraph to her complaint, alleging the following facts:

Krutz v. Craig, Administratrix.

That said decedent, Joel Craig, and the defendant, in the month of October, 1840, entered into a contract, whereby it was agreed that said Craig and Krutz would form a copartnership at said county, to carry on a general merchandising business, and for trading, shipping produce down the Ohio and Mississippi rivers, buying and selling land on speculation, milling and distilling, and for other general purposes, for an indefinite period of time, in the name of William G. Krutz, which they agreed to use as and for their firm name; that said Krutz and Craig should share the profits and bear the losses of said business equally; that each partner, at the dissolution of the partnership, should withdraw the amount of capital invested by him in said business and not withdrawn before the dissolution thereof; that said Krutz and Craig should each have his living out of said business as a part of the expenses of the same; that is, that each partner might withdraw from said business such necessities of life as each might have need of for his family, and the same should not be charged against him on the books of the firm; that at the commencement of said partnership, the said Craig invested in said business the sum of two thousand one hundred and fifty-seven dollars, and the said Krutz the sum of six hundred and ninety-seven dollars and twenty-nine cents, as appears from a memorandum in writing, made a part of the complaint as an exhibit; that the parties carried on said business under said contract, until the said Joel Craig died, on the 7th day of February, 1867; that during the existence of said partnership, the said firm made large profits over and above all expenses, to wit, thirty thousand dollars, which came into the hands of the defendant, and of which the said Craig was entitled to one-half, and of which said Krutz yet retains the sum of ten thousand dollars, belonging to said Craig's estate; that said Krutz, at the time of the dissolution of said partnership, was indebted to the firm in a large amount, to wit, twenty-five thousand dollars, for money and property withdrawn by him, which he never accounted for and justly owes the firm, one-half

Krutz v. Craig, Administratrix.

of which belongs to the plaintiff as the said Craig's administratrix; that the firm, at the time of the dissolution thereof, was indebted to Craig for money paid into it at its commencement, and during its continuance, at various times, in the sum of fifteen thousand dollars, all of which was in the defendant's hands at the time of the dissolution of said firm, and which he fails and refuses to pay over or account for in any manner.

That said firm, at divers times, purchased large and valuable tracts of real estate, in Switzerland county, Indiana, in Shelby county, Tennessee, and in various parts of the State of Kansas, which are described in a bill of particulars filed with the complaint, amounting in value to the sum of fifty thousand dollars; that said Krutz took the deeds of conveyance for said real estate (except three hundred and twenty acres in Kansas) in his own name, that being the name of the firm, for greater convenience in making sale of the same; that at the death of said Craig, the larger part of said real estate belonging to said firm, to wit, two thousand seven hundred acres of valuable lands in Kansas, town lots in the town of Paola, in Kansas, and the real and personal property, notes, cash and accounts of said firm, remained in the hands of said Krutz, and amounted in value to the sum of seventy-five thousand dollars; that at the time, the indebtedness of said firm was less than five thousand dollars, which has since been paid out of its assets.

That during the latter part of the life of Joel Craig, who was much older than the defendant, the defendant took charge of the more active part of the business, and had control of the assets and books and accounts of the firm, and so held the same until the death of said Craig, who reposed the most unbounded confidence in the integrity of said Krutz; that after the death of said Craig, she and one S. H. Stewart were appointed the administrators of said Craig, duly qualified and entered upon the duties of their trust; that she and said Stewart were ignorant of the true condition of said firm, and the amount of the assets thereof, and

Krutz v. Craig, Administratrix.

had no means of knowing the same, and this plaintiff had the principal part of said administration to perform, and was unacquainted with her rights and the facts aforesaid, which the defendant well knew, and of which he took the advantage to induce her to make the agreement hereinafter named; that the defendant, in order to accomplish his end and produce a false impression, allowed the stock in the store of said firm to run down after the death of said Craig, and represented to this plaintiff that said firm had little or no assets, and that nothing was due said Craig from said firm at the time of his death, that he (defendant) was about bankrupt, and that if O. P. Cobb, Christy & Co., with whom he had a law suit, should succeed in their suit, he, the defendant, would be compelled to take the benefit of the bankrupt law, and the plaintiff would get nothing from said firm, and proposed to compromise the affairs of said partnership with the plaintiff and said Stewart, as the administrators of said Craig, and pay them something, in order to settle up said partnership; and the plaintiff and said Stewart, relying on the truth of said representations, and being ignorant of the fact that the assets of said firm, of which said Krutz had the possession, amounted to more than what said Krutz represented, and being ignorant of the true condition of the affairs of said firm, and believing said Krutz's representations to be true, assented to his proposition; and thereupon said Krutz, on the 28th day of September, 1868, in pursuance thereof, executed to said administrators his three promissory notes of one thousand dollars each, and in addition agreed to pay the taxes on the lands in Kansas until and including the year 1871, meaning the three hundred and twenty acres standing in the name of said Craig, and to build a board partition fence between the dwelling-house of Mrs. Craig and James Hester, and to pay an account due Charles Moore and Bledsoe & Beamer of one hundred and twenty-four dollars, and John Melcher, at Vevay, for tombstones, and release any demands he might have for debts theretofore paid by him for said Craig or goods furnished Craig's family, and gave

Krutz v. Craig, Administratrix.

said administrators a memorandum in writing of said agreement, signed by him, a copy of which is filed and made a part of this complaint.

That the defendant, at and before the execution of said agreement, represented that he had paid debts for said Craig to a large amount, to wit, five thousand dollars, and that said Craig was largely indebted to said firm for goods for said Craig and assets withdrawn by him. And the plaintiff says that all of said representations so made by said Krutz were untrue, and were made by him to deceive the plaintiff and her co-administrator and throw them off their guard, and did deceive them and enable him to obtain said unfair and unjust settlement aforesaid.

That during the existence of said firm, at divers times, said Krutz took of the assets of said firm a large amount, to wit, ten thousand dollars, and purchased therewith large tracts of real estate in Indiana, Tennessee and Kansas, and took the deeds therefor in his own name, and sold part thereof and speculated in the same on his own account, and thereby realized large profits, to wit, twenty-five thousand dollars, which belong to said firm, and which he wholly failed in any manner to account for or pay over, one-half of which belongs to the plaintiff as administrator of said Craig's estate, and also one-half of the money so withdrawn, to wit, one-half of fifty thousand dollars; that she is unable to furnish a bill of particulars of the business of said firm, or of the demands aforesaid, further than those filed with the first paragraph of this complaint, for the reason that the books and accounts and papers of said firm are all in the hands of said defendant, and she is unable to furnish a bill of particulars thereof.

Prayer that said settlement be set aside, an account of the partnership be taken, and a judgment for fifty thousand dollars.

The agreement of settlement, made a part of the second paragraph of the complaint, is in the following words:

“An agreement entered into this day by William G.

Krutz v. Craig, Administratrix.

Krutz, of Switzerland county, Indiana, with Cynthia A. Craig and S. H. Stewart, administrators of Joel Craig, deceased, witnesseth, that whereas a settlement has been made between said Krutz and said administrators, of the business of said Krutz and said Craig, deceased, Krutz having executed his three promissory notes of one thousand dollars each, and in addition to which he agrees to pay the tax on the land in Kansas, until and including the year 1871, and to build a board partition fence between the dwelling-house of Mrs. Craig and Jane Hester, he furnishing the lumber and nails, and to be [a] *tyght* board fence, and also to pay an account due Charles Moore and Bledsoe & Beamer, of one hundred and twenty-four dollars, and John Melcher, of Vevay, for tombstones, and release any demands he may have for debts heretofore paid by him for said deceased, or goods furnished Craig's family.

“Witness my hand and seal, this 28th day of September, 1868. (Signed) WILLIAM G. KRUTZ.”

The appellant pleaded six paragraphs of answer. Demurrers, for want of sufficient facts, were overruled to paragraphs two, four, five and six, to which rulings the appellee excepted, and sustained, for the same cause, to paragraph three, to which ruling the appellant excepted. Various paragraphs of reply were filed to the several paragraphs of answer, and rulings in sustaining and overruling demurrers were had upon them, and exceptions taken, but as neither party discussed them in their briefs, and as we can perceive no turning point amongst the questions raised thereby, we do not more particularly state them. Issues joined, jury trial, verdict in favor of appellee for twenty-eight thousand dollars.

The verdict was returned into court, “at an adjourned March term, 1874, of said court, on the first day thereof, being the 13th day of April, 1874.” After the verdict was returned, on the same day, the appellant made a motion for a new trial, in the following words:

“And defendant moves the court for a new trial herein,

Krutz v. Craig, Administratrix.

for reasons to be filed by the second day of the next term of this court."

Afterwards, at the June term of the court, 1874, being the 15th day of June of said year, the appellant filed his motion and written causes for a new trial, together with numerous affidavits in support of the motion.

The appellee then entered a *remittitur* as to the whole amount of the verdict, except the sum of six thousand five hundred dollars. The court overruled the motion for a new trial, the appellant excepted, and ninety days were given to prepare and file his bill of exceptions. Judgment on the verdict, and appeal to this court.

The appellee insists that the record does not show any proper application made for a new trial at the term the verdict was rendered, nor any proper motion made for a new trial upon written causes filed at the time of making the motion.

It does not appear that the motion for a new trial, made by appellant, at the term the verdict was rendered, was in writing. For aught that is shown by the record, it might have been made verbally and entered on the order-book by the clerk; but it does appear clearly that no written cause was at that term filed with the motion. The statute upon the subject is as follows:

"Sec. 354. The application for a new trial must be made at the term the verdict or decision is rendered.

"Sec. 355. The application must be by motion, upon written cause, filed at the time of making the motion." 2 Rev. Stat. 1876, p. 183.

The first construction given to these sections by this court, we believe, was in the case of *Addleman v. Erwin*, 6 Ind. 494, wherein it was held that a motion for a new trial, not being in writing, could not be noticed. This ruling has been followed in numerous cases. *The Madison, etc., R. R. Co. v. The Trustees, etc.*, 8 Ind. 528; *Kirby v. Cannon*, 9 Ind. 371; *Thompson v. Shaefer*, 9 Ind. 500; *Howes v. Halliday*, 10 Ind. 339; *Lagro, etc., Plank Road Co. v. Eriston*,

Krutz v. Craig, Administratrix.

10 Ind. 342; *Nave v. Nave*, 12 Ind. 1; *Stevens v. Nevitt*, 15 Ind. 224; *Shover v. Jones*, 32 Ind. 141; *Whaley v. Gleason*, 40 Ind. 405.

By the practice established under our code by these decisions, it is clear that in this case no proper motion for a new trial was made at the term the verdict was rendered, for the reason that no written cause was filed at the time of making the motion.

The question whether it is within the power of the court to grant time beyond the term to make a motion for a new trial and file written cause at the time of making the motion, remains to be examined. In this case, it does not appear that any such time was granted at the term at which the verdict was rendered. The appellant insists, however, that the bill of exceptions shows that time was given to make the motion for a new trial, and file the reasons therefor, after the term at which the verdict was rendered had expired; but we must first ascertain whether the bill of exceptions is a part of the record or not. Waiving that question for the present, and for the purpose of more thoroughly examining the point made by the appellant, on looking into the paper purporting to be a bill of exceptions, filed at a subsequent term, we find the following statement, viz.: "And the defendant gave notice that he would move for a new trial, and time was given him until the June term of said court, in which to file his motion and reasons for a new trial."

We have seen, *supra*, that the statute requires the application for a new trial to be made at the term the verdict is rendered, and that it must be by motion, upon written cause filed at the time. This statute is imperative, and seems to deny the court all power to extend the time beyond the term.

In the case of *McNiel v. Farneman*, 37 Ind. 203, it was held, that a motion for a new trial must be made at the term at which the verdict was rendered, unless for a cause discovered afterwards. The same in *Whaley v. Gleason*, *supra*;

Krutz v. Craig, Administratrix.

Hinkle v. Margerum, 50 Ind. 240, and *Greenup v. Crooks*, 50 Ind. 410.

In the criminal practice, under section 120, 2 Rev. Stat. 1876, p. 405, it has been held that the court has no power to grant time to file a bill of exceptions beyond the term at which the trial is had. *Stewart v. The State*, 24 Ind. 142; *The State v. Harper*, 38 Ind. 13; *Kiphart v. The State*, 42 Ind. 273. The words used in section 120, above cited, in reference to bills of exceptions, are analogous to those used in sections 354 and 355, in reference to motions for a new trial; and we think, in that respect, a similar construction should be given to all the sections.

With the language of the code before us, and the decisions made under it, we are constrained to hold that the court, in a civil action, has no power, without the agreement or waiver of the parties, to grant time to make an application for a new trial, by motion, upon written cause filed, beyond the term at which the verdict or decision is rendered, unless for a cause afterwards discovered. But when a trial is pending at the close of the term, the court may progress with it until it is concluded, and the additional time thus required will be held to be within the legal term. With this construction we think no hardship will follow for want of time to apply for a new trial by motion, upon written cause filed at the time of making the motion, and within the term at which the verdict or decision is rendered. Upon this view, of course, no question arising under the motion for a new trial can be considered.

The following assignments of error in this case, however, are properly made, without a motion for a new trial:

1. The complaint does not state facts sufficient to constitute a cause of action.

2. The first paragraph of the complaint does not state facts sufficient to constitute a cause of action.

3. The second paragraph of the complaint does not state facts sufficient to constitute a cause of action.

Krutz v. Craig, Administratrix.

4. The court erred in sustaining the demurrer to the third paragraph of appellant's answer.

5. The court erred in overruling the demurrer to the appellee's amended second paragraph of reply.

The first three assignments raise the question of the sufficiency of the complaint, as a whole, and of each of its paragraphs.

The first paragraph of the complaint is brought by the administratrix of the deceased, against his surviving partner, to recover the value of certain assets belonging to the partnership, which, it is alleged, the surviving partner has refused to account for, misapplied and converted. In such cases, as the right of the administratrix is only to the share of the deceased partner, after the partnership debts are paid, and its affairs finally settled, and the shares of the partners ascertained, the complaint should contain allegations of these facts, in proper traversable averments, and show a demand made, or a proper excuse for not making a demand, before suit is brought. As the first paragraph contains none of these averments of fact, properly made, it is insufficient. The principle governing such cases is familiar and well established. *Skillen v. Jones*, 44 Ind. 136; *Cobble v. Tomlinson*, 50 Ind. 550.

The second paragraph of the complaint contains substantially the same allegations as those contained in the first paragraph, with some additional averments. There is an attempt to charge fraud against the appellant, but it is feebly done. That he purchased large and valuable tracts of land, took the titles in his own name, and sold them at large profits, was in the line of the partnership. That he took charge of the more active part of the business, had control of the assets, books and accounts of the firm, was according to his right and duty under the partnership agreement. There is no averment that he ever denied access to the books to the appellee or to any one who had a right to see them. That the appellee was ignorant of the condition of the partnership affairs, is not shown to have been the fault

Krutz v. Craig, Administratrix.

of the appellant. It is nowhere averred that the appellant knew the representations he made to the appellee were false, or that she believed them to be true; for aught that is shown, he might have believed them to be true and the recommendations he made the best that could be done for the firm. Allowing the stock of goods in the store to run down, as sales were made, was not wrong, having in view the final settlement of the partnership. These allegations are not sufficient to constitute fraud. Besides, if the fraud was well alleged, it should be shown that the appellee took advantage of it promptly upon its discovery. She should have disaffirmed the agreement at the earliest practicable moment after the discovery of the cheat. In this cause, the fraud, if any, must have been practised upon her before or at the time the agreement was made, September 28th, 1868; this suit was not commenced till the 24th of November, 1872, a period of over four years afterwards. This delay, unexplained, is too long, and is fatal to an action founded upon fraud. *Stedman v. Boone*, 49 Ind. 469; *Patten v. Stewart*, 24 Ind. 332.

There is no allegation that the partnership had been finally settled, its debts paid, and a balance found due the appellee as administratrix. The averment that the assets in the hands of the appellant, as surviving partner, "amounted in value to seventy-five thousand dollars, that at the time, the indebtedness of the firm was less than five thousand dollars, which had all been paid out of the assets," is not sufficient. The mere payment of its debts is not necessarily a final settlement of a partnership; there might have been debts to collect, accounts to settle and statements to make, before the final condition of the firm could be known. The averment does not show that anything was due the administratrix of the deceased partner; and no demand to give the surviving partner an opportunity to show the condition of the firm, and make a settlement, nor any excuse for not making such demand, is shown to have been made or to have existed, before the commencement of the action. Besides,

Krutz v. Craig, Administratrix.

the second paragraph of the complaint shows that a settlement had been made between the parties to this action before the suit was commenced, and does not aver sufficient facts to show that said settlement is not still in force, or that the agreement has not been performed. It is true, as the appellee insists in her brief, that she might have pleaded her complaint without setting out the agreement of settlement; but as she has set it out and shown that it once was valid, it behooves her to show that it is no longer in force. A complaint that carries its answer upon its face is not sufficient. It is not averred that any demand to rescind the agreement or offer to restore what had been received under it had been made. For any thing that is shown in the complaint, the appellant may have performed his part of the agreement, and the appellee have been in the full enjoyment of its benefits.

It is strongly urged in behalf of the appellee that the action is founded upon the obligation of the appellant as surviving partner, and that the agreement of settlement is no more than a receipt for so much on what is due to the appellee as administratrix, which may be explained, varied, contradicted or overthrown by parol evidence; but we are unable to see the agreement in that light. A receipt is the written acknowledgment of the receipt of money, or a thing of value, without containing any affirmative obligation upon either party to it—a mere admission of a fact, in writing; but when a receipt contains stipulations which amount to a contract, it becomes a contract, and must be governed by the law of contracts, and can be avoided only by fraud, mistake, failure of consideration, rescission, or some way known to the law. *Jones v. Clark*, 9 Ind. 341; *Barickman v. Kuykendall*, 6 Blackf. 21; *Sherry v. Picken*, 10 Ind. 375; *Pribble v. Kent*, 10 Ind. 325.

In our opinion, the second paragraph of the complaint cannot be held sufficient. *Page v. Thompson*, 33 Ind. 137; *Skillen v. Jones*, 44 Ind. 136; *DeFord v. Urbain*, 48 Ind. 219; *Jagers v. Jagers*, 49 Ind. 428; *Stedman v. Boone*, 49

The Indiana Central Canal Co. v. The State.

Ind. 469; *Cobble v. Tomlinson*, 50 Ind. 550; *Langsdale v. Girton*, 51 Ind. 99.

We do not examine the remaining two assignments of error, which are properly in the record. As the complaint must be amended, the following pleadings must necessarily be reconstructed. It is not likely, therefore, that the same questions will again arise in the case.

The judgment is reversed, with costs, cause remanded, with instructions to dismiss the action, unless leave is asked to amend the complaint.

Petition for a rehearing overruled.

THE INDIANA CENTRAL CANAL CO. v. THE STATE.

CANAL.—Sale and Conveyance of Central Canal.—Contiguous Land Set Apart for Canal.—The Governor and Auditor of State, on behalf of the State in pursuance of authority conferred on them by law, sold and conveyed to the purchaser by their deed, made in conformity with such authority therein referred to, “all the right, title, interest, claim and demand which the State may hold or possess in the Northern Division of the Central Canal, north of Morgan county, * * * and the water-power and appurtenances thereunto belonging, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures and all the appurtenances thereunto belonging, to have and to hold the same in as full and ample a manner as the undersigned are authorized by the laws aforesaid to convey the same.”

Held, in an action by the State against the Indiana Central Canal Company, holding through said deed of conveyance, to recover possession of certain land in the city of Indianapolis, lying contiguous to the portion of the canal conveyed by said deed, that said deed covered any land of the State, so situated, that had been set apart by the State for the use of the canal or water-power in their occupation and enjoyment, or that was necessary to their use and enjoyment.

Held, also, that though the State, by the sale of the canal, abandoned it as a proprietor, yet, the course of legislation showing an intent to encourage its completion and use as a canal, and there being nothing in the case showing that the purchaser or purchasers of the several parts were

53	575
148	635
53	575
155	477
53	575
164	582
53	575
166	107

The Indiana Central Canal Co. v. The State.

not to take all that was essential to the use and enjoyment of the whole as a canal, the purchaser of the part in question took the title of land pertaining to the portion conveyed by said deed essential to the use and enjoyment of the canal viewed as a whole and considered as an entirety, though not essential to the complete enjoyment of the isolated portion so conveyed.

Held, also, that if the land in question, so lying contiguous to the portion of the canal conveyed by said deed, was set apart by competent State authority for the use of the canal or water-power connected therewith, and it did not appear that the purchaser was notified, before he purchased, that the dedication had been revoked, the State could not, in said action, claim that said land was not essential to the enjoyment of the portion of the canal conveyed by said deed, and the title to said land passed by the deed without reference to the question whether it was essential to the full enjoyment of said portion of the canal.

Held, also, that the word "margins," as used in the statutes conferring the authority to sell and convey, and in said deed, in specifying the things included in the sale, should be construed as meaning something distinct from the other terms employed to designate what was to be sold and what was conveyed (as the "banks," "tow-paths," etc.); and it should not be interpreted as meaning a mere water-line, but should be regarded as covering any property belonging to the State adjacent and on the margin of the canal, which had been appropriated or set apart or occupied by the State, for canal uses, or was reasonably necessary for such uses.

SAME.—Statutes Passed at Same Session.—Construction of.—The act of January 19th, 1850, and that of January 21st, 1850, Acts 1850, pp. 21, 22, in relation to the Northern Division of the Central Canal, having been both passed at the same session of the legislature, should be regarded as both standing, to be construed together, the earlier not repealed by the later.

SAME.—Extraneous Evidence to Apply Deed to Subject-Matter.—The property not being described by numbers or by metes and bounds, either in the statutes conferring the authority to sell and convey or in the deed of conveyance made in conformity with such authority, extraneous and parol evidence was admissible to ascertain whether a particular piece of property, definitely described and ascertained, constituted a "margin," or "basin," etc.

SAME.—Principal and Agent. — Acts of Special Agent of the State in Excess of Authority.—Estoppel — Rescission of Contract.—As, under said statutes, said officers must be regarded as the special agents of the State, with power to sell and convey said property, and as said property could not be precisely identified by reference to the statutes conferring said power, it was the right and duty of said agents to identify and point out to the purchaser the particular property to be sold; and if either of said agents pointed out or designated to the purchaser particular property belonging to the State, as included in or being part of the property to be sold, that would be competent and *prima facie* evidence that it was such, and con-

The Indiana Central Canal Co. v. The State.

clusive until shown by the State not to have been such; but the State was not estopped to show that property thus pointed out or designated was not a part of the property which said officers were authorized to sell; and in such case, the purchaser would not be entitled to hold such property, although the State should not rescind the contract and place the purchaser *in statu quo*.

POWER. — *Implied Power.* — *Delivery of Possession.* — The power to sell and convey implies a power to deliver possession of the property to the purchaser.

VENDOR AND PURCHASER. — *Delivery of Key of Premises.* — The delivery of a key by a vendor to a purchaser, at the conclusion of a treaty for the sale of property, is a symbol indicative of the delivery of the possession of the house or premises purchased, to which the key belongs.

From the Hendricks Circuit Court.

A. G. Porter, B. Harrison, W. P. Fishback, C. C. Hines, W. H. H. Miller, G. T. Porter, C. Baker, O. B. Hord, A. W. Hendricks, S. H. Buskirk and J. W. Nichol, for appellant.

J. C. Denny, Attorney General, and C. A. Buskirk, Attorney General, for the State.

WORDEN, J. — This was an action brought by the State against the appellant, in Marion county, to recover a certain piece of land, situate in the city of Indianapolis, bounded on the east by West street, on the west by Blackford street, on the south by Market street, and on the north by the cross-cut of the Central Canal. The venue was changed to the Hendricks Circuit Court, where the cause was tried by jury, resulting in a verdict and judgment for the State, the defendant having unsuccessfully moved for a new trial.

The land, as will be seen by the above description, adjoins the arm of the Central Canal, and was the property of the State, at and long before the date of the deed hereinafter set out. The State executed the following deed:

“This indenture, made this 30th day of June, in the year of our Lord, one thousand eight hundred and fifty-one, between Joseph A. Wright, Governor of the State of Indiana, and Erastus W. H. Ellis, Auditor of said State, of the first part, and Francis A. Conwell, of the second part, wit-

The Indiana Central Canal Co. v. The State.

nesseth, that in pursuance of the provision of an act of the legislature of said State, entitled 'An act to authorize the Governor of Indiana to compromise with, and to cause suit to be brought against the lessees of the water-power of the Northern Division of the Central Canal,' approved January 19th, 1850; also an act entitled 'An act to authorize the sale of the Northern Division of the Central Canal,' approved January 21st, 1850, the said Joseph A. Wright and Erastus W. H. Ellis caused an advertisement to be published in the Indiana State Sentinel, in the Indiana State Journal, also in newspapers of general circulation published in the cities of Louisville, Cincinnati, New York, Philadelphia and Boston, at least sixty days before the sale, setting forth the time, place and conditions of such sale, as specified in said act; and did, on the 16th day of November, 1850, at the door of the Capitol, in Indianapolis, sell to George G. Shoup, James Rariden and John S. Newman, of the State aforesaid, all the right, title and interest of the State of Indiana in and to the portion of the Northern Division of the Central Canal situate north of Morgan county, and all the rents which shall become due after the sale of said property, and the water-power and appurtenances thereunto belonging, and all the right, title, interest, claim and demand which the State may hold or possess in such portion of said canal, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, and all the appurtenances thereunto belonging, for the sum of two thousand four hundred and twenty-five dollars, being more than two-thirds of the appraised value thereof, the said Shoup, Rariden and Newman being the highest and best bidders for the same; which said purchase-money, with interest thereon, has been paid into the treasury of the State of Indiana, by the parties aforesaid, as appears by the receipt of the Treasurer of State, No. 7939, bearing date February 7th, 1851; and whereas the legislature aforesaid enacted a joint resolution entitled 'A joint resolution on the subject

of the sale of the Northern Division of the Central Canal,' approved February 7th, 1851, confirming said sale, and directing the Governor aforesaid to convey said portion of said canal, with the rights, privileges and appurtenances thereunto belonging, as sold by him to the purchasers, their heirs and assigns, so soon as said purchasers, their heirs and assigns, shall pay the purchase-money by them severally bid, and executed the bond pursuant to the conditions of sale, to the acceptance of his Excellency, the Governor.

"And whereas the said Shoup, Rariden and Newman, on the 7th day of February, 1851, executed an instrument in writing, and thereby assigned and transferred to Francis A. Conwell, his heirs and assigns, all their right, title and interest in the purchase aforesaid.

"And whereas the said Conwell, on the 30th day of June, 1851, executed and delivered to the Governor aforesaid, the bond spoken of and required in the several acts herein named, to the acceptance and approval of the said Governor.

"Now, therefore, be it known, that by virtue of the powers vested in us, by the acts and joint resolution herein named, we, Joseph A. Wright, Governor of the State of Indiana, and Erastus W. H. Ellis, Auditor of said State, do hereby convey to the said Francis A. Conwell, his heirs and assigns forever, all the property sold, as herein specified, being all the right, title, interest, claim and demand, which the State may hold or possess in the Northern Division of the Central Canal, north of Morgan county, and all the rents which may have become or shall become due, after the sale of said property, and the water-power and appurtenances thereunto belonging, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures and all the appurtenances thereunto belonging, to have and to hold the same in as full and ample a manner as the undersigned are authorized by the laws aforesaid to convey the same.

The Indiana Central Canal Co. v. The State.

“In testimony whereof, we have hereunto set our hands and affixed the seal of said State, at the city of [SEAL.] Indianapolis, the day and the year first above written.

“JOSEPH A. WRIGHT, Governor.

“ERASTUS W. H. ELLIS, Auditor of State.

“CHARLES TEST, Secretary of State.”

The question involved in the case was, whether the title to the property in controversy passed by the deed above set out. If it did not, the State was entitled to recover. If it did, the State was not entitled to recover.

The deed was made in pursuance of two acts of the legislature referred to therein. Acts 1850, pp. 21, 22. The latter act contains the following section:

“That the Governor and Auditor of State be and the same are hereby authorized to make sale and dispose of all the right, title, interest, claim, and demand which the State holds in or to the Northern Division of the Central Canal, situated in the State of Indiana with all the water-power and appurtenances thereunto belonging, and the said Governor and Auditor are hereby authorized to convey the same to the purchaser on behalf of the State, in the name of the State of Indiana, all the right, title, interest, claim, and demand, which the State may hold or possess in such canal: *Provided, however,* that neither the Governor nor Auditor of State shall be authorized to sell said canal for a less sum than two-thirds of the fair appraised value thereof: *Provided,* that the portion of the canal and appurtenances in the county of Morgan shall be appraised, offered, and made sale of, as a separate and distinct division of the said property.”

It is not disputed by the appellee that the Governor and Auditor of State had power to sell and convey the canal, with all the water-power and appurtenances thereunto belonging, but she insists that the property in question was no part of the canal or water-power or appurtenances. The appellant, however, claims that the property in controversy was, before the sale, dedicated and set apart by the State for the

uses and purposes of the canal and water-power, and was necessary to the full and complete enjoyment thereof, and therefore, that the title to it passed by the deed.

The appellant asked the following instruction without the proviso, which the court refused as asked, but gave it with the proviso, to which the appellant excepted, viz.:

“XV. If the State had once set apart the parcel of land in controversy to provide sites for the use of hydraulic power, or for warehouses or docks, or for any other canal uses, the land so set apart must be held to have passed by the sale made to Conwell, unless there is clear evidence to show that Conwell, before he purchased, was notified that the dedication had been revoked; provided, that the land was essential to a full enjoyment, by the purchasers, of the part of the canal they bought.”

The court gave, of its own motion, the following instructions, amongst others, to which the appellant excepted, viz.:

“8. In determining whether the State ever set this property apart, or reserved it for canal purposes, it is proper to consider the state of the canal as to its contemplated extent and business necessities at the time the State was buying property along its line for these purposes, and all facts tending to show that the land was so held by the State, and the fitness and convenience of this particular property for canal uses.

“9. But something more than this the defendant must prove, in order to show that the disputed property was necessary to the full enjoyment of the thing the purchasers at the sale bought, and which is designated in the conveyance. They did not buy the whole canal in its *integrity*, as projected by the State, but only a separate division of it. Obviously, property there may have been, which had been held by the State and set apart for contemplated canal uses, which would have been not only convenient, but necessary for a complete beneficial use of the whole projected canal, in connection with a great system of state canals, which would not be at all essential to complete enjoyment of the

isolated section of one canal bought at the sale by these parties, in all the uses of which in itself it was capable.

“ 10. In passing upon the question, it will be your duty to consider that portion of the canal sold in relation to and in comparison with the canal as a whole, as originally projected, as part of the general system of internal improvements, and to remember that it is the test whether the land in question was essential to the full enjoyment of the portion sold, and not to the full enjoyment of the canal as a whole, and connected with a great system of water communication. This is the vital question upon which the case turns. What the purchasers paid is not at all important.

“ 15. Therefore, if you believe that the land in dispute, at the time of the sale to the parties under whom the defendants claim, had been set apart by competent state authority for the use of the canal, and was then so held; and further, that the land in dispute was essential to the complete use and enjoyment of that part of the Northern Division of the Central Canal sold to these parties, that is, that the thing sold could not be completely enjoyed without it, then you should find for the defendants. But should you find that it was not so set apart, or, being so set apart, was not so essential to the full enjoyment of what those purchasers bought, then the title of the State remains good, and the plaintiff should recover against the canal company.”

The deed does not, in terms, describe any particular land by metes and bounds or by numbers, but its language is broad enough to cover any land that had been set apart by the State for the use of the canal or water-power in their occupation and enjoyment, or that was essential to their use and enjoyment. *Sheets v. Selden's Lessee*, 2 Wal. 177. As to what is to be deemed essential or necessary, see *Matter of The N. Y. C. R. R. Co.*, 49 N. Y. 414; *Prather v. The Jeff., Mad. & Ind. R. R. Co.*, 52 Ind. 16.

It follows, that if the land in controversy had been set apart by the State for the use of the canal or water-power in their occupation and enjoyment, or was essential to their

The Indiana Central Canal Co. v. The State.

use and enjoyment, it passed by the deed, and the State had no right to recover.

We think the charges above set out, as given by the court of its own motion, involve an untenable legal proposition. As we understand the proposition involved in the charges, it is this, as applied to the case: that although the land in dispute may have been essential to the use and enjoyment of the canal, viewed as a whole and considered as an entirety, yet if it was not essential to the complete enjoyment of the isolated portion conveyed by the deed in question, the title to it did not pass by the deed.

It is argued, in support of the charges, that when the State sold out the canal, she abandoned it as a canal; that she did not sell it to be used by the purchaser as a canal; and therefore that the purchaser did not take all that might be necessary to its use as a canal in its entirety. The State, doubtless, when she sold the canal, abandoned it as a proprietor; but we find nothing in her legislation showing that she had abandoned the hope or expectation that it might be finished and operated by the purchaser or others. There is nothing in the case showing that the purchaser or purchasers of the several parts were not to take all that was essential to the use and enjoyment of the whole as a canal. An act was passed January 28th, 1842 (Acts 1842, p. 3), which was in force, so far as we are advised, at the time of the passage of the acts authorizing the sale, which contemplated a surrender by the State of her internal improvements, including the canal in question, to corporations, and the completion and operation of the same. Then, soon after the passage of the acts authorizing the sale, viz., on June 17th, 1852 (1 G. & H. 205), an act was passed authorizing all persons, corporations or associations who had purchased from the State any of the unfinished canals of the State, or any part of either of them, to proceed to the completion of such canal in whole or in part, etc. These acts must be taken *in pari materia*, and they show a clear intent on the part of the legislature, while the State abandoned this canal as a proprie-

The Indiana Central Canal Co. v. The State.

tor, by the sale thereof, to encourage the completion and use of the same as a canal.

The extraordinary development of the railroad system of transportation, since that time, may have disappointed the expectations of the State, and, indeed, of the purchasers of the canal, and rendered the latter in a measure useless; but this cannot change the situation of things as they stood at that time.

It seems to us, that when the State sold the canal, although sold in parcels, she sold everything that was necessary to the use of it as a canal in its entirety, the same as if the whole of it had been sold together, and to one purchaser. The several parts of a thing must be equal to the whole. When the purchasers bought the part of the canal in question, they bought it with the right to use it in connection with the other part, and took whatever there was pertaining to the part which they bought which was necessary to its use in connection with the other part.

The charges given on this point were, in our opinion, erroneous.

The fifteenth charge given contains another erroneous proposition, as we think, in that the jury were told that if the land in dispute had been set apart by competent state authority for the canal, but was not essential to the enjoyment of what these purchasers bought, then the title of the State remained good, and she could recover.

The land in controversy lies contiguous to the portion of the canal conveyed by the deed of the Governor and Auditor, hereinbefore set out, and if it had been set apart by the State for the use of the canal, it passed with that part of the canal. If it was thus set apart by the State, for the use of the canal, we think the State cannot say that it was not essential to the enjoyment of that portion of the canal. If it was essential to the enjoyment of any part of the canal, it was that part conveyed by the deed. That it was thus essential, was admitted by the State in setting it apart for that purpose, if she did so set it apart. The purchasers hav-

ing bought this portion of the canal, with this piece of land so set apart for its use, the State cannot now claim, any more than could a private individual, that it was not essential to the enjoyment of the part of the canal for the use of which it was set apart.

The charge asked by the appellant should, as we think, have been given without the proviso.

There was evidence tending to show that the land in controversy had been set apart by the State for the use of the canal or water-power connected therewith, as was assumed by the court in giving the charge with the proviso. But the proviso destroys the vitality of the charge.

If the land in controversy had been thus set apart by the State for the use of the canal, as is hypothetically assumed in the charge, the title passed by the deed, without reference to the question whether it was essential to the full enjoyment of the part of the canal purchased.

As before observed, if the State set apart this piece of land, lying where it does, for the use of the canal, it was set apart for the use of this portion of the canal, and she cannot now be heard to say that it was not essential to the enjoyment of this portion.

It was shown, on the trial, that at and before the sale, the governor pointed out and designated the piece of land in controversy as being a part of the canal property, and declared that it was being sold with it. The appellant makes the point that this estops the State to set up now that the property did not pass by the sale and deed. The views of the court not being entirely harmonious on this point, no opinion is expressed in relation to it, as the judgment below will have to be reversed for the reasons above stated, and yet to be stated.

On the trial, Daniel Yandes was introduced by the State as a witness, who testified that he knew Jesse L. Williams, who was the principal engineer of the canal at the time of a conversation between him and Mr. Williams.

Statements of Mr. Williams to the witness, not explana-

The Indiana Central Canal Co. v. The State.

tory of any thing Mr. Williams was then doing as such engineer, but as to what he had done as such, and his opinions in relation to several matters, were given in evidence, over the objection and exception of the appellant. The admission of this evidence was clearly erroneous. The mere opinions of Mr. Williams, expressed to the witness, could not be competent for any purpose that we can conceive of. The statement of what he had done as the chief engineer of the canal, viewing him as the agent of the State, could not be competent, because it was no part of the *res gestæ*.

The statements were not made concurrently with the act done and explanatory thereof, but afterwards, and were inadmissible. 1 Greenl. Ev., sec. 113.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

ON PETITION FOR A REHEARING.

WORDEN, C. J.—The appellee has filed a petition for a rehearing, asking us to reconsider the points heretofore decided; and the parties ask us to pass upon other questions arising on the record, not decided in the former opinion. In again looking through the case, we are satisfied with the decision already pronounced, but we proceed to consider the other questions involved.

In the original opinion, we set out a part of the act of January 21st, 1850, authorizing the sale of the canal, but we did not set out any part of the act of January 19th, 1850.

The third section of the latter act is as follows:

“The Governor is hereby further authorized to sell all the right, title, and interest of the State of Indiana, in and to the Northern Division of the Central Canal, and all the rents which shall become due after the sale of said property, and the water-power and appurtenances thereunto belonging, to the highest bidder therefor, on the terms and conditions and in the manner following:

“One-fourth of the purchase-money to be paid down at the

time of the sale, and the payment of the residue to be secured by approved security, and to be paid in equal annual instalments thereafter. The purchaser or purchasers shall execute to the State of Indiana, and deliver to the Governor a bond with ample security conditioned to indemnify the State forever thereafter against all damages, claims, or demands, which the State may be subjected to or liable for, on account of any deficiency in the supply of water to such lessees, their heirs or assigns. When the said one-fourth of the purchase-money shall be paid, and the residue thereof secured to be paid to the satisfaction of the Governor as above provided, and the said bond executed and delivered, the Governor of Indiana shall, in the name and under the seal of the State, execute and deliver to the said purchaser or purchasers a deed for the bed for the Northern Division of the Central Canal, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water power, structures, and all the appurtenances thereunto belonging." Acts 1850, p. 21.

The appellee claims that the act of January 19th was repealed by that of January 21st. We think, however, as they were both passed at the same session of the legislature, they are to be construed together, and both stand. See *Sheets v. Selden's Lessee*, 2 Wal. 177.

Comparing the language of the deed with the acts authorizing the sale, it will be seen that the deed follows closely and does not exceed the power of sale conferred by the two acts. The deed, it will be seen, purports to convey "all the right, title, interest, claim and demand which the State may hold or possess in the Northern Division of the Central Canal, north of Morgan county, * * * and the water-power and appurtenances thereunto belonging, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water power, structures, and all the appurtenances thereunto belonging."

Having thus seen that the sale did not exceed the terms of the power conferred, we proceed to consider the charges

The Indiana Central Canal Co. v. The State.

asked and refused, which raise the main questions not heretofore decided.

The appellant asked, and the court refused, the following charges:

“V. The legislation upon the subject of the sale of the Northern Division of the Central Canal, north of Morgan county, constituted the Governor and the Auditor of State the agents of the State to make such sale, and to put the purchaser in possession of the property sold, and such agency continued until the sale was completed by putting the purchaser in possession.

“VI. The agency of the Governor and Auditor imposed upon them the duty of ascertaining what property and rights they were to sell, and to inform persons proposing to purchase what such rights and property consisted of, and the character and location of the property.

“VII. To enable you to ascertain what property and rights the State sold and conveyed to Conwell, it will be your duty to remember and consider all declarations made by the Governor and the Auditor of State, in the course of the execution of their agency, to persons proposing to become purchasers, in respect to what property and rights would be sold and would pass to the purchaser.

“VIII. Also all acts of theirs in execution of their agency, such as pointing out (if they did so) upon a map or upon the ground, to persons proposing to purchase, the property intended to be sold.

“IX. In determining what property and rights the State sold and conveyed to Conwell, it is proper for you to consider whatever statement, if any, the Governor and Auditor made to Conwell after the sale, but before he was put in possession, or which accompanied the act of putting him in possession, in respect to the property and rights purchased by him.

“IX (a). The several acts of the legislature, authorizing the sale of the Northern Division of the Central Canal by the Governor and Auditor, including its banks, margins,

tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, and all appurtenances thereunto belonging, devolved upon the Governor and Auditor the duty of pointing out and designating to persons proposing to purchase the property so intended to be sold and conveyed; and if, in the discharge of their duties, they, or either of them, pointed out to a proposed purchaser the land in dispute as a portion of the property to be sold and conveyed; and if said land was so situated and so occupied with reference to said canal that it might reasonably be supposed to be embraced within the descriptive terms used in said laws; and if the purchaser, being so informed, believed that he was buying the land in dispute in this cause, together with the other property, he would be entitled to hold the same, unless the State, within a reasonable time after said sale, either rescinded said contract, or offered to rescind the same, entire, and place the purchaser *in statu quo* by returning the purchase-money, surrendering and cancelling his bond, etc. The State must ratify the contract as a whole or rescind it as a whole. Whatever rights were acquired by Shoup or by Conwell passed to their assignees.

“X. The delivery by the Auditor of State to Conwell or his agent, if proved, of the key of the building situate upon the parcel of ground in controversy, and its acceptance by him or such agent is proper to be considered by you in determining whether said parcel of ground passed under the deed from the State.

“XI. The delivery of a key by a vendor to a purchaser, at the conclusion of a treaty for the sale of property, is a symbol indicative of the delivery of the possession of the house or premises to which the key belongs.

“XII. The Governor having been directed by law to execute and deliver to the purchaser a ‘deed for the bed for the Northern Division of the Central Canal, including its banks, *margins*, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, and all the appurtenances thereunto belonging,’ these words contain a specifi-

The Indiana Central Canal Co. v. The State.

cation of things included in the sale, and are each to be so construed as, if possible, to have effect, and the word '*margins*' is to be interpreted as embracing something distinct from the banks, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power and structures, and to embrace something adjacent to the canal, but distinct from these, and the purchaser had a right to suppose, if not otherwise informed, that any property belonging to the State adjacent and on the margin of the canal, which had been appropriated or set apart or occupied by the State for canal uses, or was reasonably necessary for such uses, was included within his purchase.

"XXI. In respect to any land which Shoup, who purchased at the auction sale, might reasonably have supposed, from its being adjacent to or in close proximity to the canal, might be convenient for any use for which the canal was built, the statements, if any, made by the Governor, while engaged in crying the sale, or just before, importing that such property was to be sold at such sale, if Shoup relied upon such statements, and upon the faith of them made such purchase, worked an estoppel against the State, and the State cannot now be heard to deny that the statements so made were true.

"XXII. So, also, in regard to like statements, if any, made by the Governor or by Ellis, the Auditor of State, to Conwell, before Conwell made his purchase from Shoup, and with a view to such purchase, in respect to the property which passed to Shoup under his purchase from the State, these statements worked an estoppel against the State, and she cannot be heard to deny that the statements so made were true."

The property is not described by numbers or by metes and bounds, either in the acts of the legislature or in the deed executed by the Governor and Auditor. The deed was to convey "the bed for the Northern Division of the Central Canal, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, struc-

tures," etc., and, of course, these things constituted what were to be sold.

Now, it is very apparent that what constituted some, at least, if not all of these things, thus directed to be sold, must depend upon extraneous evidence. The purchaser of the canal could not claim every open ditch because he had bought the bed of the canal. In a controversy between the purchaser and a third person, it might become material to show where the bed of the canal was located. This, however, could not be done either from the laws or the deed in question. So, also, whether any particular piece of property, definitely described and ascertained, constituted the margins, basins, etc., could not be ascertained from the statutes or the deed. Resort would have to be had to extraneous evidence, to show that such particular property did constitute a margin or basin, etc.

We think the case falls within that class in which it is held that extraneous and parol evidence is competent, not to contradict or extend the terms of the deed, but to apply it to the subject-matter. See *Reed v. Proprietors, etc.*, 8 How. U.S. 274; *Sargent v. Adams*, 3 Gray, 72; *Bertsch v. Lehigh, etc., Co.*, 4 Rawle, 130; *Noonan v. Lee*, 2 Black, 499; *Heaston v. Squires*, 9 Ind. 27; *Bell's Adm'x v. Golding*, 27 Ind. 173. See, also, cases bearing on the proposition collected in *Baldwin v. Kerlin*, 46 Ind. 426.

This being the character of the laws in question, it is proper to inquire what were the powers and duties of the Governor and Auditor in making the sale. They must be regarded, we think, as the special agents of the State, with power to sell and convey the particular property in question. This includes everything that was necessary and proper in making the sale. But as the property authorized to be sold could not be precisely identified by reference to the statutes giving them authority to sell, the question arises whether they were authorized to identify and point out to the purchaser the property to be sold. We think that upon a fair construction of the statutes it was their right and their duty

to do so, in the proper discharge of their functions as such special agents.

Purchasers, by looking at the statutes, could see that the Governor and Auditor were authorized to sell and convey the canal bed, including its banks, margins, tow-paths, etc., but they could not be supposed to know what particular property was included in these specifications. They could know that whatever was included in the terms was to be sold; but they could not know definitely what property was included in the terms. The interest of the State required that the property should be sold for the best price it could be made to bring. This could not well be effected, unless the agents of the State had the power to point out to the purchasers, and let them know precisely and specifically what was to be sold. And we are of opinion that, if the Governor or Auditor pointed out or designated to the purchaser or purchasers particular property belonging to the State, as included in, or being a part of, the property to be sold, that would be competent and *prima facie* evidence that it was such, and conclusive until shown by the State not to have been such.

We are furthermore of the opinion that if the Governor or Auditor thus pointed out and designated property as included in, or being a part of, the property to be sold, which was really not so, and not included in the statutory designation of what was to be sold, the State is not estopped to show the facts by proof that the property thus pointed out or designated was no part of what was to be sold. Such act of the agents of the State would be entirely beyond the scope of their authority, for which the State would be in no way bound. While the Governor and Auditor had power to point out to the purchasers the property which they were authorized to sell, they had no power or authority to point out to the purchasers other property not included in the statutory power of sale, as the property to be sold.

The State is bound by the acts of her agents, when they confine themselves within the limits of the authority confer-

red; but when they transcend the authority conferred, their acts, thus in excess of their authority, are not binding upon the State.

The Governor and Auditor had authority to point out and designate the property which they were authorized to sell; and if they pointed out or designated property to be sold, it will be presumed to have been such as was embraced in the terms of the laws authorizing the sale, until the contrary is shown. But the State will not be estopped to show the contrary, because the selling of property not authorized by the statutes would be an act as destitute of authority as if nothing had been authorized to be sold. By such sale the State could not be bound, nor could such sale have the effect of estopping the State to show the truth of the matter. Story on Agency, sec. 307; *Lee v. Munroe*, 7 Cranch, 366; *Johnson v. United States*, 5 Mason, 425; *United States v. Martin*, 2 Paine, 68.

Keeping in view these propositions, applicable to the case, we proceed more directly to the consideration of the charges asked and refused.

The fifth charge, we think, should have been given. The power to sell and convey property implies a power to deliver possession.

It follows, from what has already been said, that the sixth, seventh, eighth, ninth, tenth and eleventh charges were proper and should have been given.

Charges IX. (a), XXI. and XXII. were correctly refused.

Charge IX. (a) is based upon the theory that, if the land in dispute was no part of what was authorized to be sold, yet if the Governor or Auditor pointed it out to the purchaser as such, in the manner stated in the instruction, the purchaser would be entitled to hold it, unless the State rescinded the contract and placed the purchaser *in statu quo* by returning the purchase-money.

This proposition cannot, in our opinion, be maintained.

If the Governor and Auditor, as the agents of the State,

The Indiana Central Canal Co. v. The State.

pointed out and sold land not authorized by the statutes in question to be sold, the act was done entirely without authority, and the State stands in no worse condition, nor the purchaser in any better condition, than if the agents had had no authority to sell any land whatever. Such acts of her agents, totally unauthorized, could not bind the State in any respect.

What we have already said sufficiently shows the objectionable character of charges twenty-first and twenty-second.

We return to charge number twelve. We concur with counsel for the appellant in the proposition that the word "margins," as used in the law and in the deed, not only means something, but it means something more than is expressed by the other terms employed to designate what was to be sold, and what was conveyed.

The counsel for the appellees claim, as we understand their brief, that the word means a water-line, or a mere line. They say: "Counsel for appellant argue that the word 'margin' does not mean the water-line, or any other mere line. Webster so defines the word. No other or different definition can be found." There are, however, broader and different definitions given to the word by the lexicographers. Thus, one of the definitions given to the word by Webster is the following: "Specifically, the part of a page at the edge left uncovered in writing or printing; an uncovered, bordering space." The word would have no significance whatever, if its sense were restricted to a mere line or water-line. Used in that sense, it would convey nothing, for a line has no breadth. We think it was used in a sense quite broad enough to cover the property mentioned in the instruction, viz., "any property belonging to the State, adjacent and on the margin of the canal, which had been appropriated or set apart or occupied by the State for canal uses, or was reasonably necessary for such uses." The purchaser not only had the right to suppose that such property was included within his purchase, but, in our opinion, such prop-

White v. The State.

erty passed to him by his purchase. The instruction should have been given.

The court gave some instructions at variance with the views which we entertain of the case, as hereinbefore expressed, but we deem it unnecessary to set them out or to extend this opinion further by discussing them.

We have thus passed upon the important questions arising in the cause, as counsel have requested.

Petition for a rehearing overruled.

WHITE v. THE STATE.

CRIMINAL LAW.—*Evidence.—Intention of Defendant.—Larceny.*—On the trial of an indictment for larceny, the defendant is competent to testify as to what his intention was, at the time the goods, with the stealing of which he is charged, came into his possession, in regard to taking and converting them to his own use.

From the Miami Circuit Court.

J. L. Farrar and J. Farrar, for appellant.

C. A. Buskirk, Attorney General, for the State.

NIBLACK, J.—At the April term, A. D. 1876, of the Miami Circuit Court, the appellant was indicted for grand larceny. The indictment charges, that the appellant did “unlawfully and feloniously steal, take and carry away fifty pounds of bacon, of the value of seven dollars and fifty cents, of the personal goods and chattels of one Noah W. Trissall.” There was a plea of not guilty, and, on the trial which followed, there was a verdict of guilty, assessing the fine at fifteen dollars, fixing the punishment at two years in the state prison, and his disfranchisement at the same period of time. A motion for a new trial was overruled, and judgment rendered on the verdict. The evidence is all in the

White v. The State.

record, and the necessary exceptions properly reserved. One of the errors assigned is the refusal of the court below to grant a new trial, as prayed for by the appellant.

The first reason assigned in support of the motion for a new trial was the exclusion by the court of certain testimony offered by the appellant.

The appellant was examined as a witness on the trial, in his own behalf, and testified, amongst other things, as to the circumstances under which he came into the possession of the meat, which it was alleged he had stolen. His attorney inquired of him, in substance, what his intention was, if he had any, at the time of receiving said meat, in regard to taking and converting the same to his own use. Objection was made to that question, because, as was alleged, the intention which the appellant may have then had was not a subject-matter of proof in that way. The objection was sustained, and the proposed testimony excluded. It was the exclusion of this testimony of which the appellant complained in his motion for a new trial.

In the case of *Greer v. The State*, ante, p. 420, decided at the present term, this court held that, in a criminal proceeding, where the intent is the gist of the offence charged, the defendant is a competent witness to testify as to the intention with which he did the alleged criminal act. That the objection, if any, to such testimony, must go to the defendant's credibility, and not to his competency. We regard the rule thus laid down on that point as the proper construction of the law, since defendants have been permitted to testify on their own behalf in criminal cases, and we still adhere to it.

In a criminal cause, the intent is a fact known to, and peculiarly within the knowledge of, the defendant, and we see no well founded reason why he may not testify concerning it, as he might as to any other fact of which he has knowledge. Because the intent is a fact which cannot, in the nature of things, be positively known to others, and is, hence, a matter about which other witnesses cannot directly testify,

The B., P. & C. R. W. Co. v. The N. A. & S. R. R. Co. *et al.*

does not, in our opinion, affect the rule above laid down as to the competency of the defendant in that respect.

We are clearly of the opinion, therefore, that the court below erred in excluding the proposed testimony of the appellant as to the intention existing in his mind when he came into the possession of the meat which he is charged with having stolen.

There are other errors assigned on the record of this cause, and other causes for a new trial were assigned in the court below, but the view we have already taken as to the action of that court, in excluding the proposed testimony of the appellant, renders it unnecessary for us to consider any of the other alleged errors at present.

The judgment below is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for a return of the prisoner.

**THE BALTIMORE, PITTSBURGH AND CHICAGO R. W. Co.
v. THE NEW ALBANY AND SALEM R. R. Co. ET AL.**

PRACTICE.—*Removal of Cause to United States Court.*—*Affidavit.*—Under an act of Congress providing for the removal of causes in certain cases from state courts to the circuit court of the United States, and requiring, for that purpose, among other things, the making and filing of an affidavit in the state court by the party seeking the removal, “stating that he has reason to *and does* believe that, from prejudice or local influence, he will not be able to obtain justice in such state court,” an affidavit in which the affiant stated, “that he has reason to believe,” etc., omitting the words “and does,” was held insufficient.

SAME.—*Repeal of Law.*—*Revised Statutes of United States.*—The act of Congress of March 2d, 1867, amendatory of the act of July 27th, 1866, “for the removal of causes in certain cases from state courts” (14 Stat. at Large, 558), was repealed by the Revised Statutes of the United States, approved June 22d, 1874.

From the Porter Circuit Court.

The B., P. & C. R. W. Co. *v.* The N. A. & S. R. R. Co. *et al.*

C. Baker, O. B. Hord, A. W. Hendricks and S. J. Anthony, for appellant.

HowK, J.—This was a proceeding commenced by appellant, a corporation of this State, in the court below, to condemn a right of way for appellant's railroad, across the railroad track of the appellee The New Albany & Salem Railroad Company, in Porter county.

The appellant was incorporated under the general laws of this State, providing for the incorporation of railroad companies; and this proceeding seems to have been instituted under the provisions of the thirteenth section of the act entitled, "An act to provide for the incorporation of railroad companies," approved May 11th, 1852. 1 Rev. Stat. 1876, p. 696, *et seq.*

In the instrument of appropriation, filed by appellant in the court below, it was stated that both of the appellees "have, or claim to have, some interest" in the railroad track, across which appellant sought to obtain a right of way. And in appellant's petition to the court below, for the appointment of appraisers to assess the damages caused by the appropriation, both of the appellees were made defendants thereto, and the property, across which the appellant was seeking a right of way, was described in the petition as "the track of The New Albany and Salem Railroad Company, now operated by the Michigan Central Railroad Company."

The appellees appeared to the petition in the court below, and filed joint objections to the appointment of appraisers; but the objections were overruled, and the appraisers were appointed. These appraisers returned their assessment of damages to the court, in which they awarded to the appellees one hundred dollars, as their damages. Appellant paid these damages to the clerk of the court, and then filed, as did also the appellee The Michigan Central Railroad Company, their separate exceptions to the assessment of damages. Before these exceptions were heard and determined by the

The B., P. & C. R. W. Co. *v.* The N. A. & S. R. R. Co. *et al.*

court, the appellee The Michigan Central Railroad Company presented to the court, in this cause, its petition, the affidavit of James F. Joy, who is described as its president, and its penal bond, with sureties, praying in said petition that this suit might be removed into the next Circuit Court of the United States, to be held in the District of Indiana, to which removal appellant at the time objected, on the ground of the insufficiency of the affidavit and petition, which objection was overruled by the court below, and to this ruling appellant at the time excepted. And thereupon, the record shows, the court below made the following order in this cause, viz.:

“And on due consideration, said bond is approved as due and sufficient surety for such removal, and it is ordered by the court that this suit be and it is hereby removed into the next Circuit Court of the United States, to be holden in the District of Indiana, and that no further proceedings be had therein in this court, the affidavit of said Joy having now, in the opinion of the court, been properly authenticated; to all of which the plaintiff now objects and excepts.”

From this order of the court below appellant has appealed to this court, and, upon the record here, has assigned as error, that the court below erred in granting the application of the appellee The Michigan Central Railroad Company, for the removal of this cause for trial into the next Circuit Court of the United States for the District of Indiana, and in making the order for such removal of this cause into said last named court.

The proceedings for the removal of this cause from the court below into the United States Circuit Court for this district were instituted and had under the provisions of an act of Congress, approved March 2d, 1867, amending the act entitled, “An act for the removal of causes in certain cases from state courts,” approved July 27th, 1866. This amendatory act of March 2d, 1867, provided, in substance, as follows: That where a suit was pending, or might there-

The B., P. & C. R. W. Co. *v.* The N. A. & S. R. R. Co. *et al.*

after be brought, in any state court, in which there was a controversy between a citizen of the state in which the suit was brought and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether plaintiff or defendant, "if he will make and file, in such state court, an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court," may at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of such suit into the next United States Circuit Court for the district in which such suit is pending, and upon his offering good and sufficient surety for his doing certain things, specified in the act, it is made "the duty of the state court to accept the surety and proceed no further in the suit." 14 U. S. Stat. at Large, 558, and 2 Brightly's Dig. 116, sec. 17.

It will be seen, from the foregoing summary of the act of March 2d, 1867, that when a party sought to remove a suit from a state court into the next U. S. Circuit Court for the district, under the provisions of the act in question, his first step must be to make and file, in the state court, an affidavit containing the certain, clear and positive statement required by that act. In this case the appellee The Michigan Central Railroad Company filed in the court below an affidavit of its president. This affidavit was objected to by appellant as insufficient; the objection was overruled by the court, and to this ruling appellant excepted. The question, therefore, of the sufficiency of the affidavit is properly before us for decision. The material part of the affidavit filed is in these words:

"This affiant further says that he has reason to believe that from local influence said Michigan Central Railroad Company will not be able to obtain justice in said suit, in said Porter Circuit Court."

It will be seen, from the language quoted, that the affiant

The B., P. & C. R. W. Co. v. The N. A. & S. R. R. Co. *et al.*

has only sworn that "he has reason to believe," while the act of Congress, under which the affidavit was made, required that he should swear that "he has reason to and *does* believe." In our opinion, the affidavit filed was not sufficient, under the act of Congress referred to, to entitle the appellee The Michigan Central Railroad Company to the removal of this suit from the court below into the next U. S. Circuit Court for this district, or to justify the court below in making the order for such removal.

The proceedings for the removal of this cause from the court below were had in that court in December, 1874; and they were instituted and had, as before stated, under the act of Congress of March 2d, 1867, before cited. It is very clear now, although perhaps it was not so well known then, that the act of Congress under which these removal proceedings were had in the court below had been repealed for about six months prior to the order of that court for the removal of this cause. The Revised Statutes of the United States were approved June 22d, 1874, and embrace all the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, 1873; and they expressly repeal all acts of Congress passed prior to the day last named, any portion of which is embraced in any section of said revision. Rev. Stat. U. S., 1091, secs. 5595 and 5596. A portion of the act of Congress of March 2d, 1867, is embraced in section 639 of said Revised Statutes, page 113, and, therefore, by the approval of the Revised Statutes, on June 22d, 1874, the act of Congress of March 2d, 1867, is expressly repealed. What bearing, if any, this repeal of the act referred to might have in this case, we need not and do not decide. All that we now decide is, that the affidavit made and filed in this cause, in the court below, was not sufficient in law to authorize that court to make an order for the removal of this cause from that court, into the next Circuit Court of the United States for the District of Indiana. The court below erred in overruling appellant's objec-

The B., P. & C. R. W. Co. *v.* The N. A. & S. R. R. Co. *et al.*

tion to that affidavit, and for that error the order of that court for such removal of this cause must be reversed.

The order of the court below is reversed, and the cause is remanded, with instructions to the court to sustain appellant's objection to the affidavit of James F. Joy, and for further proceedings.

INDEX.

ABATEMENT OF ACTION.

Injury to Person.—Action for Death Caused by Wrongful Act.—An action for damages for an injury to the person of the plaintiff abates by his death, and the pendency thereof cannot be pleaded in bar of an action brought by his personal representative for his death resulting from such injury and caused by the wrongful act or omission of the defendant.

The I. & St. L. R. R. Co. v. Stout, Adm'r, 143

AFFIDAVIT.

See U. S. COURT, REMOVAL OF CAUSE TO.

ALIBI.

See BASTARDY, 2.

ALIMONY.

See DIVORCE, 3.

ALTERATION OF WRITTEN INSTRUMENT

See PRINCIPAL AND SURETY, 4, 5.

AMENDMENT.

See BILL OF EXCEPTIONS, 8; DEMURRER, 2; PLEADING, 15.

APPEAL.

See COSTS; LIQUOR LAW, 2; REVIEW OF JUDGMENT, 4; SUPREME COURT.

APPEARANCE.

See JURISDICTION, 1, 2.

ARREST OF JUDGMENT.

Answer.—Where there is one good paragraph in an answer, which will uphold a judgment for the defendant, the judgment cannot be arrested because the answer contains other paragraphs which are not good.

Harris v. Rivers et al., 216

ASSIGNMENT OF ERRORS.

See PRACTICE, 1; SUPREME COURT, 2, 3, 4, 8.

ATTORNEY.

See EVIDENCE, 3; PRINCIPAL AND AGENT, 2.

Appointed to act as judge. See JURISDICTION, 3.

1. *Proceeding to Disbar.—Jurisdiction.—Construction of Statute.*—The pro-

vision of the code, section 777, 2 G. & H. 329, that "any court of record may suspend an attorney from practising therein" for causes there stated, means that any court of record *having jurisdiction* may suspend an attorney from practising therein for such causes.

Mattler v. Schaffner et ux., 245

2. *Same.—Criminal Circuit Court.*—A court having jurisdiction of criminal actions alone, as the Marion Criminal Circuit Court, cannot suspend an attorney from practice at the suit of a person from whom said attorney has obtained money to pay a fine and costs adjudged against another, which the attorney has not so used and refuses to restore to the plaintiff. *Id.*

AUDITOR OF STATE.

See TAX, 2.

BAILMENT.

1. *Mechanic's Lien on Chattel.*—The lien of a mechanic upon a chattel for labor performed thereon by him is destroyed by his voluntary relinquishment of the possession of the chattel to the bailor. *Tucker v. Taylor*, 93
2. *Same.—Agreement for Future Payment.*—Such lien cannot exist where, by the terms of the contract of bailment, a future day of payment for such labor has been agreed upon. *Id.*
3. *Same.*—A mechanic, having repaired a wagon for another person, the owner thereof, for which labor payment was to be made in the use by the mechanic of the wagon and a horse to be furnished by said owner, to make a certain journey, permitted said owner to take possession of the wagon, and, after a time, received it again to use on said journey; but, said owner having failed to furnish a suitable horse, the mechanic asserted a lien upon the wagon for his said work thereon, advertised it for sale, and became the purchaser at such sale.
Held, that said owner was entitled to recover the possession of the wagon from said purchaser. *Id.*

BASTARDY.

1. *Complaint Sworn to Before Notary Public.*—The complaint in a bastardy proceeding may be sworn to before a notary public. *Sample v. The State, ex rel. Brooks*, 28
2. *Evidence.—Alibi.*—Where, on the trial of a bastardy proceeding, the relatrix testified positively that the child was begotten by the defendant on a certain night, at a certain place, and there was evidence that she had sexual intercourse with other men in the same month, it was error to refuse to permit the defendant to introduce evidence that he was not at said place on said night, but was at another place. *Id.*
3. *Support of Child by Another than the Mother.*—Where the mother of a bastard child, by a legal and proper arrangement with a third person, which has gone into operation, has become released from her obligation to support said child, and has ceased to support it, she has no right to call further upon the putative father to aid in its support. And where a third person supports such child, not as discharging a duty of the mother on her neglect to discharge it, or as an act of humanity simply, but under a contract voluntarily made upon a consideration, such third person is not entitled to receive, in addition, statutory compensation for supporting such child as a bastard. *Young v. The State, ex rel. Converse*, 536
4. *Same.—Judgment Where Child has been Apprenticed.*—The mother of a bastard child, by deed duly executed, relinquished said child, until it should arrive at the age of eighteen years, to a certain orphan asylum, in consideration that said asylum would support and furnish a home

for the child until it should reach that age, empowering said asylum, if it should see fit to do so, to cause said child to be adopted by some suitable person, or bound out till of age to such a person. Afterwards, and within two years from the birth of the child, the mother commenced a prosecution for bastardy against the putative father; pending which prosecution, said asylum, pursuant to said deed, by an article of indenture, apprenticed said child to a stranger, who under said article took and retained the child, whose maintenance and education, in consideration of its services, were secured by said article, until it should arrive at the age of eighteen years. Upon a verdict that the defendant in said prosecution was the father of said child, the court rendered judgment that the defendant pay for the support of the child a certain sum in instalments, etc., making the instalments payable to the person to whom the child had been apprenticed, to be used by him in the support, etc., of the child.

Held, that the judgment was erroneous; that the court should not have adjudged the payment of any sum to the person to whom the child was apprenticed, but should have merely awarded a just compensation to the mother for the time during which she supported the child before she relinquished it to said asylum. *Ib.*

5. *Evidence.—Interest of Relatrix. — Instruction to Jury.*—On the trial of a prosecution for bastardy, the court, in instructing the jury in relation to the consideration to be given to the interest of the relatrix, in determining her credibility as a witness, stated, "that she has an interest in establishing the paternity of her bastard child, and also in recovering a judgment for money for the maintenance of said child. And of such recovery, if any," she "gets nothing, and has no interest other than that arising from her relationship to the bastard child, such recovery being solely for the support and maintenance of said child."

Held, that the last sentence, when considered in connection with the former portion of the instruction, could not mislead the jury, and that the instruction, taken as a whole, was not erroneous.

Decker v. The State, ex rel. Harrell, 552

BILL OF EXCEPTIONS.

See EVIDENCE, 10; RECORD, 2.

1. *Dismissal of Appeal from County Commissioners.*—The question as to the correctness of the ruling of the circuit court in dismissing an appeal from the action of the board of commissioners of the county cannot be presented without a bill of exceptions setting forth the ground on which the circuit court acted.

Meeker et al. v. B'd of Comm'rs of Fountain Co. et al., 31

2. *Motion to Strike Out.*—The action of a court in refusing to strike out a paragraph of a pleading cannot be presented to the Supreme Court without a bill of exceptions. *Bell v. The I., C. & L. R. R. Co., 57*

3. *Substituted Bill.*—When a bill of exceptions is filed as a substitute for one for the filing of which time beyond the term was given, it should appear that the original was filed within the time allowed.

Everett v. Gooding, 72

4. *Oral Evidence.—Clerk.*—After a bill of exceptions has been signed, oral evidence cannot be inserted therein by the clerk, in places wherein he is directed to insert it. *Ib.*

5. *Filing.*—Where, time beyond the term having been given in which to file a bill of exceptions, a bill has been filed, but it does not appear at what time it was filed, or that it was filed within the time limited, it does not constitute a part of the record.

Sherlock et al. v. The First Nat'l Bank, 73

6. *Time of Filing*.—A bill of exceptions, for the filing of which no time has been given, cannot be filed after the term.
Marshall v. Beeber et al., 83
7. *Striking Out Pleading*.—A pleading or a part of a pleading struck out by the court cannot be presented to the Supreme Court without a bill of exceptions setting it out.
Weathers et al. v. Doerr et al., 104
8. *Amendment of Complaint After the Sustaining of Demurrer for Want of Jurisdiction*.—The ruling of a court in granting leave to amend a complaint, after a demurrer thereto assigning want of jurisdiction of the court over the subject of the action has been sustained, can be reserved for the consideration of the Supreme Court only by a bill of exceptions setting out the original complaint and showing the ground of objection to the amendment and the action of the court thereon.
Shepard et al. v. Birth, 105
9. *Striking Out Pleading*.—To present to the Supreme Court the action of the court below in striking out a paragraph of pleading, the question must be reserved by bill of exceptions.
Jackson et al. v. Reeves, 231

BILL OF PARTICULARS.

See EVIDENCE, 9.

BOND.

See COUNTY COMMISSIONERS, 2; GUARDIAN AND WARD, 2, 4; OFFICIAL BOND; PRINCIPAL AND SURETY, 1, 2, 3.

1. *Coupons.—Municipal Corporation*.—Where a municipal corporation has power to issue and negotiate bonds for a certain purpose, with interest payable at stated intervals, the payment of the interest may be provided for by coupons attached to the bonds, executed at the same time, referred to in the bonds, and themselves referring to the bonds to which they are attached, of which they, in substance, constitute parts.
Town of Cicero v. Clifford et al., 191
2. *Same.—Suit on Coupon*.—Such a coupon, detached from its bond, is negotiable, and, when matured, forms, by itself, a cause of action against such corporation.
Ib.
3. *Consideration*.—A bond for the payment of money imports a consideration, like a bill of exchange or promissory note, and therefore need not recite any consideration.
Baker v. The B'd of Comm'rs of Washington Co., 497

BURDEN OF PROOF.

See PRINCIPAL AND SURETY, 1.

CANAL.

1. *Sale and Conveyance of Central Canal.—Contiguous Land Set Apart for Canal*.—The Governor and Auditor of State, on behalf of the State, in pursuance of authority conferred on them by law, sold and conveyed to the purchaser by their deed, made in conformity with such authority therein referred to, "all the right, title, interest, claim and demand which the State may hold or possess in the Northern Division of the Central Canal, north of Morgan county, * * * and the water-power and appurtenances thereunto belonging, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures and all the appurtenances thereunto belonging, to have and to hold the same in as full and ample a manner as the undersigned are authorized by the laws aforesaid to convey the same."
Held, in an action by the State against the Indiana Central Canal Com.

pany, holding through said deed of conveyance, to recover possession of certain land in the city of Indianapolis, lying contiguous to the portion of the canal conveyed by said deed, that said deed covered any land of the State, so situated, that had been set apart by the State for the use of the canal or water-power in their occupation and enjoyment, or that was necessary to their use and enjoyment.

Held, also, that though the State, by the sale of the canal, abandoned it as a proprietor, yet, the course of legislation showing an intent to encourage its completion and use as a canal, and there being nothing in the case showing that the purchaser or purchasers of the several parts were not to take all that was essential to the use and enjoyment of the whole as a canal, the purchaser of the part in question took the title of land pertaining to the portion conveyed by said deed essential to the use and enjoyment of the canal viewed as a whole and considered as an entirety, though not essential to the complete enjoyment of the isolated portion so conveyed.

Held, also, that if the land in question, so lying contiguous to the portion of the canal conveyed by said deed, was set apart by competent State authority for the use of the canal or water-power connected therewith, and it did not appear that the purchaser was notified, before he purchased, that the dedication had been revoked, the State could not, in said action, claim that said land was not essential to the enjoyment of the portion of the canal conveyed by said deed, and the title to said land passed by the deed without reference to the question whether it was essential to the full enjoyment of said portion of the canal.

Held, also, that the word "margins," as used in the statutes conferring the authority to sell and convey, and in said deed, in specifying the things included in the sale, should be construed as meaning something distinct from the other terms employed to designate what was to be sold and what was conveyed (as the "banks," "tow-paths," etc.); and it should not be interpreted as meaning a mere water-line, but should be regarded as covering any property belonging to the State adjacent and on the margin of the canal, which had been appropriated or set apart or occupied by the State for canal uses, or was reasonably necessary for such uses.

The Indiana Central Canal Co. v. The State, 575

2. *Same.—Statutes Passed at Same Session.—Construction of.*—The act of January 19th, 1850, and that of January 21st, 1850, Acts 1850, pp. 21, 22, in relation to the Northern Division of the Central Canal, having been both passed at the same session of the legislature, should be regarded as both standing, to be construed together, the earlier not repealed by the later. *Ib.*

3. *Same.—Extraneous Evidence to Apply Deed to Subject Matter.*—The property not being described by numbers or by metes and bounds, either in the statutes conferring the authority to sell and convey or in the deed of conveyance made in conformity with such authority, extraneous and parol evidence was admissible to ascertain whether a particular piece of property, definitely described and ascertained, constituted a "margin," or "basin," etc. *Ib.*

4. *Same.—Principal and Agent.—Acts of Special Agent of the State in Excess of Authority.—Estoppel.—Rescission of Contract.*—As, under said statutes, said officers must be regarded as the special agents of the State, with power to sell and convey said property, and as said property could not be precisely identified by reference to the statutes conferring said power, it was the right and duty of said agents to identify and point out to the purchaser the particular property to be sold; and if either of said agents pointed out or designated to the purchaser particular property belonging to the State, as included in or being part of the property to be sold, that would be competent and *prima facie* evidence that it was such, and conclusive until shown by the State not to have been such; but the State was not estopped to show that property thus pointed out

or designated was not a part of the property which said officers were authorized to sell; and in such case, the purchaser would not be entitled to hold such property, although the State should not rescind the contract and place the purchaser *in statu quo*. *Id.*

CASE OVERRULED.

Evidence.—Testimony of Party as to his Intent.—*Zimmerman v. Marchland*, 23 Ind. 474, overruled. *Greer v. The State*, 420

CITY.

See SUPREME COURT, 10.

1. *City Attorney.—Docket Fees.*—Docket fees, to which, under section 30 of the act of March 14th, 1867, for the incorporation of cities (1 Rev. Stat. 1876, p. 280), a city attorney is entitled, in prosecutions commenced before the mayor or city judge, for violations of city ordinances, are not to be paid by the city, but are to be charged up as costs against the defendants, on pleas of guilty or on convictions on pleas of not guilty. *Tuley v. The City of Logansport*, 508
2. *Same.—Judgment Paid by Manual Labor.*—Where persons convicted of violations of ordinances of a city incorporated under said general law for the incorporation of cities, from whom docket fees are therefore due to the city attorney, are adjudged, in default of paying or replevying the judgments and costs, to pay the same by manual labor, and do, accordingly, work out the judgments and costs, under the provisions of section 20 of said law, the city does not thereby become bound to the city attorney for the docket fees thus paid by manual labor. *Id.*

CONSIDERATION.

See BOND, 3; COUNTY COMMISSIONERS, 2.

1. *Promissory Note.—Special Finding.*—In an action by an assignee on a promissory note not payable in bank, executed by A. and B., it was answered by B. and found by the jury in answer to interrogatories, that it was agreed by the makers and payee, at the time of the execution of the note, that it should not be valid or binding as against B., until after he should receive a paid up policy of insurance on the life of A. for a certain sum, this being the only consideration for the signing of the note by B., and that no such policy was ever delivered or tendered to him.
Held, that this special finding was not inconsistent with a general verdict in favor of B. *Woodward v. Begue*, 176
2. *Mutual Promises.*—When a number of persons subscribe an instrument, whereby they agree to pay certain sums of money, severally, to be expended in the erection of a college building, their mutual promises constitute a sufficient consideration for the promise of each. *Higert v. The Trustees of Ind. Asbury Univer.*, 326

CONSTITUTIONAL LAW.

See COUNTY AUDITOR, 1; EXECUTION, 3; PATENT; TURNPIKE, 2.

1. *Title of Act.—Liquor Law of 1873.*—Section 12 of the liquor law of 1873 (Acts 1873, Reg. Sess. 151) was not liable to the objection that it was unconstitutional on account of there being more than one subject embraced in the title of the act. *Jackson et al. v. Reeves*, 231
2. *Passage of Statute.—Limit of Judicial Inquiry.*—Courts of this State cannot look beyond the enrolled act of the legislature, to ascertain whether there has been a compliance with the requirement of the constitution,

that "no bill shall be presented to the governor within two days next previous to the final adjournment of the General Assembly."

Bender v. The State, 254

CONTINUANCE.

See PRACTICE, 1.

Absence of Witness.—Diligence.—Where notice of an action was given to a defendant by service of summons on the 13th of March, and he appeared to the action on the 25th of the same month, and made no substantial effort to obtain the testimony of a certain absent witness, until the 21st of October following, five days before the next term of the court in which said action was pending, there could be no error in refusing, at said next term, to grant said defendant a continuance of the cause on account of the absence of said witness. *Wolcott et al. v. Mack et al.*, 269

CONTRACT.

See CONSIDERATION; CORPORATION, 6, 7; INSTRUCTIONS TO JURY, 5; MAINTENANCE; RECEIPT; UNSOUND MIND, 1, 2.

1. *Performance.*—A request made by a principal to his commission merchant to buy corn to fill the balance of a quantity of corn which the former had contracted to sell to a third person did not authorize the commission merchant to pay money to the purchaser to discharge the obligation of the seller, it not appearing that the corn was deliverable under the contract at the time the money was so paid.

Godman et al. v. Meixsel et al. 11

2. *Sale Prohibited by Law.*—When intoxicating liquor is sold at retail, contrary to a statute making such sale a misdemeanor, the seller cannot recover the price or value thereof from the buyer.

Millikin v. Davis, Adm'r, 206

3. *Promissory Note.—Pleading.—Answer.*—Suit by an assignee on a promissory note not payable in bank. Answer by the maker, that the note was given in consideration of a certain horse, purchased by said maker for himself and his father, named, and was to be signed by said maker and his father as a joint obligation; that at the time of the execution of the note, the payee was indebted to said maker and his father for work done and materials furnished at the payee's request, a bill of particulars thereof being made part of the answer, in a certain sum greater than the amount of the note; that while the payee held the note, he agreed with the maker and his father, in consideration of said indebtedness, that said horse should go in payment of said indebtedness, if the payee did not pay the same by doing certain labor; and the answer proposed to set off said indebtedness, and prayed judgment for costs and other relief.

Held, that this answer was not good as an answer of set-off, or as showing a want or failure of consideration, or as showing an accord and satisfaction, but was bad on demurrer for want of sufficient facts.

Parks v. Zeek, 221

4. *Same.—Evidence.—Written Contract.—Parol Contemporaneous Agreement.* It could not constitute a defence to such note, that at the time of the execution thereof, the maker and payee verbally agreed that if the latter should not, by performing certain labor, pay a certain debt which the payee owed to the maker and a certain third person, and which the payee had promised to so pay, the consideration for which said note was given, being a certain horse then sold by the payee to the maker, should be regarded as paid for and should be applied as a credit upon said indebtedness of the payee; and that no part of said labor to be performed by the payee had ever been performed. *Ib.*

5. *Purchase of Partnership Interest. — Assuming Liabilities. — Taxes.*—One member of a firm sold his interest in the partnership to one who, by the terms of the contract, agreed to pay a certain sum to said member and to take his place in said firm and to pay his share of the debts and liabilities of said firm, said member at the time of the sale exhibiting to said purchaser a written statement purporting to contain a showing of the liabilities of the firm, nothing being said about taxes in said written statement or orally.
Held, that said purchaser was bound for the payment of the retiring member's share of state and county taxes assessed against the firm at the time of the sale. *Wheat v. Hamilton*, 256
6. *Promise to Make Provision in Will. — Damages.*—Where a person promises that, at his death, he will leave, give and bequeath a certain share of his estate to another, in consideration of certain service to be performed by the latter, an action for damages will lie for the violation of such promise, against the personal representative of the former, on behalf of said other person, he having performed said service under the contract, and the damages may be measured by the value of the portion promised, and the plaintiff will not be limited to the value of the service so performed by him. *Frost et al. v. Tarr et ux.*, 390

CORPORATION.

See BOND, 1, 2; PATENT, 2.

1. *Voluntary Association. — Articles of Association. — Amendment of Articles. — Corporate Seal.*—The articles of association of a voluntary association organized under the act of February 20th, 1867, 3 Ind. Stat. 550, to which subscriptions of capital stock were made, did not contain an impression or description of the corporate seal, but provided for amendments according to section 3 of said act, and the articles as recorded for the purpose of organizing the corporation stated, "The corporate seal shall be a circle formed by the letters of" the name of the association and the name of the State.
Held, in an action by the corporation upon a subscription of capital stock, to recover an assessment made thereon by the board of directors, that this was a sufficient compliance with the requirement of the statute that the articles of association shall contain an impression and description of the corporate seal. *Vawter v. Franklin College*, 88
2. *Name and Residence of Stockholder.*—The subscription of stock sued upon in said action was made to the articles of association by writing the name of the subscriber, his residence and his number of shares in order under the words "Names, Residence, Shares."
Held, that the defendant could not claim that the articles of association did not show the name and place of residence of each stockholder. *Id.*
3. *Filing of Articles in Recorder's Office. — Pleading.*—The complaint in said action alleged that the association "caused said articles to be put on record in the recorder's office," etc.
Held, that this showed a sufficient filing under the statute. *Id.*
4. *Records. — Evidence.*—The records of a corporation are competent evidence on its own behalf to prove its organization and existence; and the introduction in evidence by the corporation of the record of a meeting of its stockholders could not be objected to on the ground that the minutes of such meeting were made on loose sheets of paper, and kept in a drawer several months, before they were copied into a book called the "record," it not appearing that such minutes did not truly represent the action of said meeting, or that the "record" was not adopted by the stockholders, or that there was anything improper in the transaction. *Id.*
5. *Notice to Stockholder of Assessment.*—A notice to a stockholder in a volun-

tary association of the amount due on an assessment upon his capital stock, the contract subscribed by him specifying no place of payment, need not designate the place of payment. *Ib.*

6. *Contract.—Seal.*—A corporation may make a valid contract without using any seal, when not expressly required to contract under the seal of the corporation. *Trustees of Christian Church v. Johnson*, 273
7. *Pleading.*—Suit against the trustees of a certain church upon a written contract, purporting therein to be the contract of the trustees of said church, and signed “M. T. Didlake, Sec’t’y;” the complaint alleging that the contract was signed by the defendants under the name and style of “M. T. Didlake, Sec’t’y;” and that the said secretary was duly authorized by the corporation known as “The Trustees of,” etc., and by the trustees of said corporation, to enter into said contract.
Held, that it sufficiently appeared that the contract was the contract of said trustees, and that the secretary was authorized to sign it. *Ib.*
8. *Name Importing that Defendant is a Corporation.*—Where the name by which a defendant is sued imports that the defendant is a corporation (as “The Indianapolis Sun Company”), the complaint need not expressly allege that the defendant is a corporation.

The Indianapolis Sun Co. v. Horrell, 527

COSTS.

- Costs on Appeal from Justice of the Peace.*—Where, on appeal from a judgment of a justice of the peace to the circuit court by the judgment-defendant, the judgment was against the same party, and that before the justice was not reduced five dollars, but if the interest accrued between the trials, which was included in the judgment, were deducted, the judgment of the justice would have been reduced more than five dollars;
Held, that the costs in the circuit court should follow the judgment.

Widup v. Gibson et al., 484

COUNTY AUDITOR.

See OFFICIAL BOND.

1. *Salary.—Constitutional Law.*—That portion of section 11 of the act of March 12th, 1875 (Acts 1875, Spec. Sess. 31), which provides for an increased compensation to a county auditor where the population of the county exceeds fifteen thousand, is not in conflict with the constitutional prohibition of the passage of local or special laws in relation to fees or salaries. *Hanlon v. The Board of Commissioners of Floyd Co.*, 123
2. *Same.—Construction of Statute.*—In determining the amount of the allowance to a county auditor under said section 11, the last census taken by the United States must be looked to, for the purpose of determining whether there is an excess of population over fifteen thousand, and also the amount of the excess; and the increase of compensation provided for by said section can be made only by adding to the allowance of fifteen hundred dollars, provided for each county without regard to population, the sum of one hundred and twenty-five dollars for each one thousand inhabitants in excess of fifteen thousand, no addition being authorized for a fractional part of one thousand inhabitants. *Ib.*
3. *Stamps.—Post-office Box.*—No allowance can be made to a county auditor for stamps for the use of his office or for post-office box rent. *Ib.*
4. *School Fund.—Construction of Statute.*—By the words “school fund of the county,” used in section 12 of said act of March 12th, 1875, providing that “auditors shall receive one per cent. for managing the school fund of the county;” reference is made to that fund only which by section 2 of the act of March 6th, 1865, 3 Ind. Stat. 440, is made a permanent fund never to be diminished in amount; and it was not intended by said words to embrace state taxes for school purposes, spe-

cial school taxes, local school taxes, interest on common school fund, interest on congressional school fund, or taxes distributed to the county. **BUSKIRK, J.**, dissented, holding that under said words, "school fund of the county," it was intended to include the income of the various permanent school funds. *Id.*

COUNTY CLERK.

See **BILL OF EXCEPTIONS, 4**; **PRACTICE, 2**; **SUPREME COURT, 4**.

COUNTY COMMISSIONERS.

See **LIQUOR LAW, 2**.

1. *Allowance by.—Collateral Proceeding.—County Treasurer.*—To a suit by a board of county commissioners against a late treasurer of the county for money received by him as such treasurer and not paid over, it was a good defence that, the defendant having lost said money by burglary and larceny, the board of commissioners of the county, in a settlement with him as such treasurer, allowed him the amount so lost, and ordered that he be relieved and discharged from the payment thereof, which action of the board of commissioners had not been appealed from and remained in force. *B'd of Comm'rs of Hancock Co. v. Bradley, 422*
2. *Bond.—Power to Contract.*—Where a penal bond for the payment of money (and therefore importing an executed consideration) has been taken by a board of county commissioners, the obligor having authority to make it, the right of the board to recover in an action thereon cannot be denied on the ground of want of authority to take it, where it does not appear but that the money, for the payment of which the bond was given, is due the board as a corporation in the exercise of its legitimate power. *Baker v. The B'd of Comm'rs of Washington Co., 497*

COUNTY TREASURER.

See **COUNTY COMMISSIONERS, 1**; **OFFICE AND OFFICER.**

Suit on Official Bond.—Payment by Sureties.—Pleading.—Where a county treasurer, at the expiration of his term of office, has failed to deliver to his successor public money in his possession as treasurer, it is the duty of the county auditor, upon being so required by the board of county commissioners, to bring suit, as relator, upon the official bond of said treasurer for such failure; and said auditor may compromise such suit so brought by him, and receive the money so agreed to be paid; and upon the compromise of such a suit, and the payment by the sureties on said bond of the money so found to be due, such sureties, in an action brought by them against said treasurer to recover the amount so paid by them, need not allege that such payment was made to said treasurer's successor in office. In such an action by sureties, it was a sufficient allegation of such payment by them, that "the plaintiffs paid to the commissioners of said county and auditor of said county and their attorney of record in said suit, and, on," etc., "in fact and in truth, did pay over, to the persons authorized to receive the same, the aforesaid sum," etc. *Cabel et al. v. McCafferty et al., 75*

COUPON.

See **BOND, 1, 2**.

CRIMINAL CIRCUIT COURT.

See **ATTORNEY, 1, 2**.

CRIMINAL LAW.

See **EVIDENCE, 13, 15**; **INSTRUCTIONS TO JURY, 12**; **LIQUOR LAW, 1, 2, 3**; **NEW TRIAL, 11**; **RECOGNIZANCE**; **STATUTE OF LIMITATIONS**; **SUPREME COURT, 5, 12**.

1. *Arson.—Indictment.*—An indictment for arson which charged the defendant with setting fire to "the barn of one Laura Wolf" was not liable to the objection that it did not sufficiently allege that the barn was in the actual possession of the person named, in her own right.
Wolf v. The State, 30
2. *Indictment.—Duplicity.—Sale of Intoxicating Liquor on Sunday.*—In an indictment for selling, on Sunday, December 6th, 1874, one gill of intoxicating liquor, to be drank on the premises where sold, an averment that the defendant had not a license or permit authorizing him so to do did not render the indictment objectionable for duplicity, but such averment was merely surplusage.
The State v. Hutzell, 160
3. *Duplicity.—Giving Away Intoxicating Liquor.*—Prosecution by affidavit and information alleging that the defendant, at, etc., on, etc., did "sell, barter and give away intoxicating liquor to," etc., a person in the habit of getting intoxicated, but not alleging what, if anything, was paid for the liquor, or what, if anything, was exchanged for it.
Held, on motion to quash the affidavit, that the words charging a sale and a barter should be regarded as surplusage, and there was no duplicity.
Eagan v. The State, 162
4. *Jurisdiction.—Property Stolen in One County Brought into Another.*—An indictment charged, that, "at the county of Madison, in the State of Indiana, on," etc., the defendant "did then and there feloniously steal, take and drive away from the said county of Madison, and did then and there feloniously bring into and dispose of in the county of Delaware" (in which the indictment was found) "and State of Indiana, of the personal goods and chattels of," etc., one milch cow, etc.
Held, that the indictment sufficiently described the transfer of the stolen property from Madison to Delaware county, to give jurisdiction to the court in the latter county.
Jones v. The State, 235
5. *Instructions to Jury.*—On the trial of a criminal action, it is not error for the judge, in charging the jury, to state that witnesses have testified to certain facts, if he also inform the jury that they are the exclusive judges of the facts.
Ib.
6. *Grand Jury.—Selection After Commencement of Term.—Answer in Abatement.*—It was not a sufficient reason for the abatement of an indictment, that the grand jury which presented it—selected under a statute (2 Rev. Stat. of 1876, p. 417) providing that the persons chosen thereunder "shall constitute the grand jury of the county for the next ensuing two terms of the circuit court"—was selected after the commencement of the term of the circuit court at which the indictment was found.
Kelley v. The State, 311
7. *Instruction to Jury.—Manslaughter.*—On the trial of an indictment for murder, the court, in its charge to the jury, stated, "If you should find from the evidence, beyond a reasonable doubt, that the defendant, without malice, either express or implied, and with no intent to murder, unlawfully, involuntarily killed the decedent," naming him, "this would be manslaughter," the context of the charge giving the full statutory definition of manslaughter.
Held, that the defendant could not complain of the omission, in the portion of the charge quoted, of the words, "but in the commission of some unlawful act."
Ib.
8. *Murder.—Indirect Cause of Death.*—Where wounds have been inflicted by one person upon another, and the latter afterward dies, it is not indispensable to a conviction of the former of murder or manslaughter, under an indictment based upon the infliction of such wounds, that they were necessarily fatal, and were the *direct* cause of the death; but if they caused the death indirectly, through a chain of natural effects and causes, unchanged by human action, it is sufficient in this regard.
Ib.

9. *Same.*—Where a person has inflicted wounds upon another, which are fatal, and of which the latter dies, or which are dangerous in themselves, though not necessarily fatal, and cause congestion of the brain, of which the wounded person dies, or congestion of the brain, so induced, causes the exposure of the injured person to the inclemencies of the weather, by which he dies, it must be held that the person who gave the wounds caused the death by the infliction of them. *Ib.*
10. *New Trial. — Motion.*—Motion for a new trial in a criminal action assigning as cause, that “the jury has received evidence that was illegal, admitted by court.”
Held, that this was too indefinite. *Wolfington et al. v. The State*, 343
11. *Larceny.—Lost Goods.*—When a finder of lost goods takes possession thereof and appropriates them to his own use, without knowing, at the time of first taking possession, who is the owner, and without having reasonable means of then knowing that fact, such taking and conversion cannot constitute larceny. *Ib.*
12. *Assault, or Assault and Battery, With Intent to Commit Manslaughter.*—Under section 9, 2 G. & H. 438, prescribing a penalty for the perpetration of an assault, or an assault and battery, with intent to commit a felony, an indictment will lie for an assault, or an assault and battery, with intent to commit voluntary manslaughter.
The State v. Throckmorton, 354
13. *Same.—Indictment.—Offence of Different Degrees.*—Under an indictment for an assault, or an assault and battery, with intent to commit murder in the first degree, if the evidence justify it, there may be the same conviction as under an indictment for an assault, or an assault and battery, with intent to commit manslaughter. Therefore, where there was a trial and acquittal under a count for an assault and battery with intent to commit murder, the judgment could not be reversed for the quashing of a good count for assault and battery with intent to commit manslaughter. *Ib.*
14. *Disturbing Lawful Meeting.—Pleading.*—In a prosecution under the act of November 30th, 1865 (3 Ind. Stat. 257), for molesting or disturbing a meeting other than those for the purposes specifically named in said act, the affidavit, information, or indictment should aver that it was a meeting for a lawful purpose; and an affidavit which described the meeting as “a certain collection of divers inhabitants of the State of Indiana, met together as a singing-school,” was bad on motion to quash.
The State v. Zimmerman et al., 360
15. *Change of Venue.—Counter Affidavits.—Judicial Discretion.*—Motion by a defendant in a criminal action for a change of venue, founded on his affidavit that he could not have a fair and impartial trial because of the excitement and prejudice against him and his defence in the county, which affidavit was met by the affidavit of sixty citizens residing in different parts of the county, that they had a general acquaintance with the citizens of their respective neighborhoods, that they had heard of no excitement or prejudice against the prisoner, and that, from their knowledge and acquaintance with the citizens of the county, the prisoner could have a fair and impartial trial of his case at that term of the court.
Held, that the question was one within the sound discretion of the court, and that there was no abuse of such discretion in overruling the motion. *Bissot v. The State*, 408.
16. *Murder Committed in the Perpetration of Burglary.*—Where, after a person had burglariously broken and entered into a house, and while he was yet within the house, and immediately after a watchman, who came to the door by which said person had so entered, had shot at such person, he shot and killed the watchman;
Held, that the homicide, being committed within the *res gestæ* of the burg-

lary, was committed "in the perpetration" of the burglary, within the meaning of section 2, 2 R. S. 1876, p. 423. *Ib.*

17. *Conviction Under One Count and Acquittal as to Another.*—On the trial of an indictment containing two counts, the first charging a homicide committed by the defendant "purposely and with premeditated malice," and the second charging the killing to have been done "purposely and with premeditated malice, in the perpetration of burglary," an acquittal as to the first count and a conviction on the second did not acquit the defendant on the whole indictment. *Ib.*

18. *Previous Conviction.—Justice of the Peace.*—Where a person made an affidavit before a justice of the peace, charging another person, though defectively, with the commission of an assault and battery, and said justice thereupon issued a warrant for the arrest of the accused, who appeared before the justice and was thereupon tried and convicted of said offence, such conviction, remaining in force, (said justice having thus had jurisdiction of the subject-matter and of the person of the defendant) was a bar to a subsequent prosecution of said defendant on a charge of assault and battery growing out of the same act, however irregular the proceeding before said justice may have been, in that the person injured was not present at said trial, and no process was issued for him. *The State v. George, 434*

CUSTOM.

See INSURANCE, 4.

DAMAGES.

See CONTRACT, 6; LIBEL, 2; REAL ESTATE, ACTION TO RECOVER, 1.

Mental Suffering.—Pleading.—In an action to recover damages for an injury to the person of the plaintiff, caused by the wrongful act or omission of the defendant, the jury, in estimating the amount of damages, may consider suffering and anxiety of mind of the plaintiff caused by such injury, as the plain consequences thereof, without special allegation of such suffering and anxiety of mind in the complaint.

Wright et al. v. Compton, 337

DEATH CAUSED BY WRONGFUL ACT.

See ABATEMENT OF ACTION; EVIDENCE, 4; NEGLIGENCE, 1; PLEADING, 17; RAILROAD, 2.

DECEDENTS' ESTATES.

See PARTIES, 4.

1. *Pleading.—Exhibit.*—Where a claim is filed against a decedent's estate for money collected on a note belonging to the claimant by the deceased in his lifetime and appropriated to his own use, such note need not be filed with the claim. *Bryson, Adm'r, v. Kelley, 486*
2. *Same.*—Where a claim was filed against a decedent's estate, founded on an alleged agreement by which the claimant sold certain lands to the deceased in his lifetime for a certain sum, on condition that the latter should resell said lands, and that whatever he should realize over said sum, deducting expenses therefrom, should be refunded to the claimant; and it was alleged that the deceased sold the lands for a certain sum, larger than the price paid by him to the claimant, and refused to pay the difference;
Held, that it was not necessary to file such agreement with the claim. *Ib.*

DEMAND.

See PLEADING, 18.

DEMURRER.

See GUARDIAN AND WARD, 3; INJUNCTION, 2; NEW TRIAL, 2; PARTIES, 1; PLEADING, 21 to 25.

1. *Practice*.—Sustaining a demurrer to a good paragraph of answer is not an available error, if, on the trial, all the evidence that would be admissible thereunder be introduced without objection.
Morgan et al. v. Olvey et ux., 6
2. *Amendment*.—*Waiver*.—Error in sustaining a demurrer to a pleading is waived by subsequent amendment of the pleading.
Wingate v. Wilson, 78
3. *Harmless Error*.—Where demurrers to paragraphs of answer have been sustained, and there is afterwards filed an additional paragraph of answer, under which all evidence may be admitted on the trial that would have been admissible under those to which demurrers have been sustained, errors in such rulings on the demurrers cannot be available on appeal.
Shepard et al. v. Birth, 105

DEPOSITION.

Residence of Witness.—The deposition of a witness, who at the time of the taking of the deposition resided in another state, was properly excluded upon proof that at the time of the trial he was residing in this State, in a county adjoining that in which the trial was had.

The I. & St. L. R. R. Co. v. Stout, Adm'r, 143

DESCENT.

1. *Widow*.—*Action to Recover Possession of Real Estate*.—A person died intestate, in 1861, seized of certain real estate in this State, leaving surviving him a widow and a child by her, and also children by a previous wife; and one-third of said real estate was set apart to said widow as such. Afterwards, her said child died, and she intermarried again, and had another child by her second husband, and joined her second husband in a conveyance of her said portion of said real estate.
Held, that said widow inherited one-third of the intestate's said real estate in fee simple, and that, without regard to the question as to her right to alienate her said portion during her subsequent marriage, said children of the intestate by a previous wife, or those representing their interests, could not recover the real estate so conveyed from one holding under said conveyance.
Williams et al. v. Venner et al., 396
2. *Same*.—*Effect of Statute of 1852 as to Land of Husband Theretofore Conveyed by Him Alone*.—Where a husband conveyed land which he owned in fee simple, his wife not joining in the conveyance, before the taking effect of the statute of 1852, which abolished dower and gave a surviving wife an interest in fee in real estate so owned and conveyed, and said husband died after the taking effect of said statute, leaving his said wife surviving him, she was not entitled to any interest in said land.
Colman v. De Wolf, 428

DIVORCE.

1. *Evidence*.—*Residence of Petitioner*.—On the trial of an action for a divorce, it is not necessary that there be formal and express proof of the residence of the petitioner required by the statute, or such proof that two witnesses testifying to such residence are resident householders and freeholders of the State; but it is sufficient, if, by the evidence in the cause, these facts be proved to the satisfaction of the court trying the cause.
Maxwell v. Maxwell, 363
2. *Same*.—Where, in an action for a divorce, the residence of the petitioner is not proved as required in section 7 of the act of March 10th, 1873, regulating the granting of divorces (2 Rev. Stat. 1876, p. 326), the court has no power to decree a divorce.
Powell v. Powell, 513

3. *Alimony.—Custody of Children.—Judicial Discretion.*—In an action for a divorce, the questions of the amount of alimony and the temporary custody of infant children of the marriage are matters largely within the discretion of the court trying the cause; and the abuse of this discretion must be very clear, to justify the Supreme Court in interfering with its exercise. *Ib.*

ESTOPPEL.

See CANAL, 4; PLEADING, 9.

ESTRAY.

Action by Owner of Animal to Recover Possession.—The owner of an animal taken up as an estray cannot maintain an action in the circuit court to recover the same from the person who has possession by virtue of his compliance with the provisions of the estray law, until such owner shall have proved his ownership before a justice of the peace, and paid or tendered charges for keeping the animal, as provided by said law.

Logan v. Marquess, 16

EVIDENCE.

See BASTARDY, 2, 5; CANAL, 3; CONTRACT, 4; CORPORATION, 4; DEPOSITION; DIVORCE, 1, 2; EXECUTION, 2; FORMER ADJUDICATION; FRAUD, 2; INSTRUCTIONS TO JURY, 6, 12; INSURANCE, 3, 4; NEW TRIAL, 11; PRINCIPAL AND SURETY, 1; RAILROAD, 4; RECEIPT; RECOGNIZANCE, 2; WITNESS.

1. *Pleading.—Instruction to Jury.*—Where, in an action on a promissory note, brought by the payee against the maker, a paragraph of answer alleged that the note was given for a certain machine sold by the plaintiff to the defendant, and set up as a defence a warranty and the breach thereof, and also fraudulent representations, it was error to instruct the jury that, to sustain said paragraph, there must be proof of the fraudulent representations alleged therein.

Ingerman v. Dietrick, 9

2. *Certified Copies of Records.*—A certified copy of the record of a deed or a mortgage is admissible in evidence under section 283, 2 G. & H. 183; and the repeal of section 31, 1 G. & H. 265, by the act of May 4th, 1869, 3 Ind. Stat. 136, did not affect such admissibility.

Abshire v. The State, ex rel. Wilson et ux., 64

3. *Declarations of Party.—Attorney.—Agent.*—On the trial of an action by A. against B. to recover one-half of the costs and expenses incurred in a suit theretofore prosecuted in their joint names and paid by A., the question in controversy being whether B. was a real party in interest in said joint action, and therefore liable for one-half the costs and expenses thereof, or whether he had no interest therein, and it was commenced without his knowledge or consent, and he afterwards agreed that it might be prosecuted in his name, with that of A., for the sole benefit of A., and without responsibility on his part, as between him and A., for said costs and expenses, it was competent for B. to give in evidence a conversation between himself and an attorney of A. in said joint action, had in the absence of A., after B. had learned of the pendency of said joint action, in which conversation such an agreement for the continued prosecution of said joint action was made, and also a conversation, had also in the absence of A., between B. and another attorney of A. in said joint action, who had been instructed by A. to procure the signature of B. to an appeal bond for the purpose of appealing said joint action to the Supreme Court, for the purpose of showing that B. signed said appeal bond upon a similar condition and agreement.

Blessing v. Dodds, 95

4. *Proof of Testimony of Deceased Witness.*—On the trial of an action brought by an administrator to recover damages for the death of his intestate caused by the wrongful act of the defendant, evidence is admissible to prove what was the testimony of witnesses, since deceased, on the trial of an action brought by said intestate, and abated by his death, for damages for injuries caused by said wrongful act.
I. & St. L. R. R. Co. v. Stout, Adm'r, 143
5. *Irrelevant Evidence Admitted Without Objection.*—Upon the trial of such an action, where no answer has been filed, the complaint is deemed to be controverted as if a denial were filed, and evidence of affirmative matter of defence, such as a settlement of the matter in controversy, is inadmissible; and where such evidence, foreign to the issue, has been introduced, it should be disregarded, though admitted without objection or exception.
Denbo v. Wright, Adm'r, 226
6. *Promissory Note.—Justice of the Peace.*—On the trial of an action commenced before a justice of the peace, where there is no answer, the defendant has the benefit of the general denial; and if the action be upon a promissory note, the plaintiff cannot recover if the note be not given in evidence.
The L., C. & S. W. R. W. Co. v. Braden, 234
7. *Age.—Personal Appearance Before Jury.*—The appearance of a person in respect to his age, as seen by the court or jury, cannot be considered as evidence.
Ihinger v. The State, 251
8. *Same.—Selling Liquor to Minor.—Instruction to Jury.*—On the trial of a prosecution for selling intoxicating liquor to a minor, it was not permissible for the jury to look at the personal appearance as to age of the alleged minor, who had testified as a witness in their presence, and to regard such inspection, either with or without competent evidence of his age, in determining whether or not the defendant acted in good faith in selling him the liquor.
Ib.
9. *Bill of Particulars.—Waiver.*—When an answer is not accompanied by a bill of particulars, the plaintiff, by failing to demur or to move for a bill of particulars, waives objection to the fact that no bill of particulars accompanies the answer; and on the trial, such fact cannot constitute a reason for sustaining an objection to a question propounded to a witness by the defendant.
Chamness v. Chamness, 301
10. *Record.—Bill of Exceptions.—Exclusion of Evidence.*—The ruling of a court upon the trial of an action, in refusing to permit a question to be answered by a witness, will not be reviewed by the Supreme Court, where the record does not show the particular facts which it was proposed to elicit by the question.
Ib.
11. *Expert.—Value of Board.*—The fact that a witness who testifies to the value of board is not an expert cannot constitute an objection to his evidence.
Ib.
12. *Hypothetical Question.*—Where, on the trial of an action, the value of services rendered by one of the parties for the other, in boarding and taking care of certain persons, was in issue, it was not error to admit, over objection, the answer of a witness to a question asking what such services would be worth under supposed circumstances stated, there being evidence tending to prove the existence of such circumstances.
Ib.
13. *Testimony of Party as to His Intent.*—Where, on the trial of an action, a party, competent to testify in his own behalf, becomes a witness, and the character of the transaction in question depends upon the intent of such party, it is competent for him to testify as to what his intention was; accordingly, where, on the trial of an indictment for an assault and battery with intent to commit a felony, the defendant became a witness in his own behalf, it was competent for him to testify as to what his

intention was in committing the alleged assault and battery. *Zimmerman v. Marchland*, 23 Ind. 474, overruled on this point.

Greer v. The State, 420

14. *Sheriff's Return*.—Evidence that on the day on which an execution was levied upon land, and before the levy was made, the execution-defendant pointed out and gave up to the officer who held the execution unincumbered personal property of a certain value, consisting of certain chattels, sufficient to satisfy the execution, which the officer refused to receive, was not evidence tending to contradict a statement in the officer's return that at a certain date the officer demanded payment of the execution defendant, and he directed the officer to levy on real estate, and in pursuance of said direction, on a certain date, nearly two months after the former date, he levied on certain real estate described.

Gilpin v. Wilson, 443

15. *Criminal Law*.—*Intention of Defendant*.—*Larceny*.—On the trial of an indictment for larceny, the defendant is competent to testify as to what his intention was, at the time the goods, with the stealing of which he is charged, came into his possession, in regard to taking and converting them to his own use.

White v. The State, 595

EXCEPTION.

See INSTRUCTIONS TO JURY, 1; REVIEW OF JUDGMENT, 2.

EXECUTION.

See EVIDENCE, 14; SHERIFF.

1. *Replevin Bail*.—An execution-plaintiff cannot be required, before proceeding against the property of replevin bail, to resort to real estate of the judgment-defendant which has been duly and legally sold by the sheriff, for much less than its value, under a prior judgment in favor of another plaintiff against the same defendant, who has no other property subject to execution, said execution-plaintiff having the right to redeem said real estate from said sale.

Edwards et al. v. Haverstick, Adm'r, 348

2. *Exemption of Property from Sale*.—*Inventory*.—*Evidence*.—An execution-defendant, who demanded the exemption of certain articles from sale under the execution, presented to the officer holding the execution, before sale, an inventory purporting therein to be "an inventory of," etc., following the language of section 1 of the act of March 5th, 1859, as amended in 1861, 2 Rev. Stat. 1876, p. 352, except the omission of the words "within or without this State," and the commas before and after them, after the words "real estate;" and the affidavit attached thereto, made and subscribed by the execution-defendant, stated that "the foregoing inventory" contained "a full and true account of all the property held by him on," etc., the date of the issuing of the execution, and that none of said property had been since disposed of, except, etc., showing how certain articles mentioned in the inventory had been disposed of, and what disposition had been made of the proceeds.

Held, that the inventory was sufficient, and constituted material evidence to sustain an action by the execution-defendant against said officer and the execution-plaintiff, to recover possession of articles sold by the officer to the execution-plaintiff under said execution, in disregard of the execution-defendant's demand for their exemption from such sale.

Gregory v. Latchem et al., 449

3. *Same*.—*Constitutional Law*.—*Construction of Exemption Statutes and Proceedings*.—Statutes to carry into effect the provision of the constitution, that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable

amount of property," etc., and proceedings in carrying such statutes out practically, should be liberally construed. *Ib.*

EXECUTOR AND ADMINISTRATOR.

See VENDOR AND PURCHASER, 3; WITNESS, 2.

FORMER ADJUDICATION.

See REAL ESTATE, ACTION TO RECOVER, 2.

Presumption. — Evidence. — The presumption that whatever matters were embraced in the issues in an action were determined in the adjudication is not conclusive; and where a former adjudication is relied upon by a party, it is competent for the adverse party to allege and prove by parol what questions were considered and determined by the court or jury in the former action. *Bottorff v. Wise*, 32

FRAUD.

1. *Not to be Presumed.*—Fraud is not to be presumed, but must be established like any other fact in controversy. *Morgan et al. v. Olvey et ux.*, 6
2. *Fraudulent Conveyance.—Evidence.*—In an action to set aside as fraudulent a conveyance of real estate, and to subject the real estate to sale to satisfy a judgment against the grantor, the necessity of resorting to such real estate should be proved. *Ib.*
3. *Pleading.*—Suit on a promissory note, by the payees against the maker. Answer, admitting the execution of the note, and alleging that it was procured by fraud, in this, that the defendant had purchased of the plaintiffs certain machinery, to be delivered on demand, upon receiving which the defendant was to execute his note, due at a certain period thereafter, for a certain sum; that on, etc., before said machinery had been received, and as the defendant was about starting away upon a train, one of the plaintiffs came to him with a note, and falsely and fraudulently assured him that said note was all right and in accordance with the contract; and the defendant, being hurried, and relying upon said representations, signed said note as of that date; but that the plaintiffs fraudulently and wrongfully ante-dated said note as of a certain date, nearly three months prior to the date on which it was signed, the date it was to bear according to the contract; that as soon as he learned that said note had been so ante-dated, he demanded that it should be changed so as to comply with the contract, which the plaintiffs refused to do; and that they withhold said note. Prayer, that it be adjudged fraudulent, etc.
Held, that the answer was bad on demurrer. *Dutton v. Clapper et al.*, 276
4. *Pleading.—Fraudulent Conveyance.—Debtor's Insolvency.*—In an action whereby a creditor seeks to recover judgment for the amount of his claim and to subject to execution property fraudulently conveyed by his creditor to a third person, an allegation in the complaint that the debtor has no property left subject to execution is a sufficient allegation of the debtor's insolvency, and shows a sufficient reason for seeking to reach the property so fraudulently conveyed.
Alford et al. v. Baker et al., 279
5. *Same.—Description of Property.—Defect Cured by Verdict.*—In such a complaint, the property alleged to have been fraudulently conveyed was described as "a tobacco factory in the city of Logansport, situate at the lock foundry, worth, with the fixtures and appurtenances, seven thousand dollars."
Held, on motion in arrest of judgment, that this was sufficient to let in proof which might render the identity of the property certain, and the description was therefore good after verdict for the plaintiff. *Ib.*

6. *Fraudulent Conveyance.—Insolvency.—Property in Another State.*—Where a debtor, residing in this State, has fraudulently conveyed away all his property subject to execution in this State, the fact that another person indebted with him as his partner, residing in another state, and having no property in this State, owns property in said other state, out of which the creditor could make his demand, will not prevent the creditor from proceeding to reach the property so fraudulently conveyed, though he may reside in said other state and the debt may have been contracted there. *Ib.*
7. *Same.—Effect of.*—A conveyance of real estate, made for the purpose of hindering or delaying creditors of the grantor, is legal and binding as between the parties and as to all others than such creditors, and the real estate is subject to levy and sale under an execution against the grantee, and another conveyance thereof, subsequently made by said grantor, can pass no title. *Edwards et al. v. Haverstick, Adm'r, 348*
8. *Rescission.—Consideration.*—Where a promissory note has been procured by false and fraudulent representations, the party defrauded cannot rely on the fraud as a defence in an action on the note, if, as the consideration for the note, he received anything of value which he has not restored or offered to restore. *Heaton v. Knowlton et al., Adm'rs, 357*
9. *Rescission of Contract.—Diligence.*—An unexplained delay of over four years in disaffirming an agreement was held fatal to an action to rescind the agreement on the ground of fraud. *Krutz v. Craig, Adm'x, 561*

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GRAND JURY.

See CRIMINAL LAW, 6; SUPREME COURT, 12.

GUARDIAN AND WARD.

1. *Judgment.—Practice.*—The complaint in an action by a minor against his guardian did not ask any relief, except that the court “discharge and remove the defendant from his said trust as such guardian,” and did not allege that the guardian had any specific sum of money in his hands for which he ought to account; and the court found merely that the defendant was the guardian of the plaintiff, a minor, and that it would be to the interest of said ward to have said guardian removed. *Held*, that the court could not order the guardian to immediately make report and pay into court the assets in his hands belonging to said ward. *Held*, also, that, to reserve such an error in the judgment for the consideration of the Supreme Court, a motion for a new trial was not necessary. *Hancock v. Heaton, 111*
2. *Guardian's Bond.—Extent of Liability Thereunder.*—The bond of a guardian, conditioned for the faithful discharge of his duties as guardian of the person and property of a person therein named and designated as the minor heir of a deceased person named, covers moneys of said ward's estate received by said guardian from other sources, as well as those received from the estate of said decedent; and the recovery in an action on such bond cannot be limited to the value of the estate mentioned in the statement made on the application for the appointment of the guardian, but may extend to the value of the whole estate of the ward, then held or afterward acquired, not exceeding the amount of the penalty of the bond, except proceeds of the sale of the ward's real estate by order of court. *Hunt et al. v. The State, ex rel. Martin et ux., 321*
3. *Foreign Guardian.—Demurrer.—Capacity to Sue.*—Where a foreign guardian sues to recover personal estate of his ward in this State, the fact

that the complaint does not show that the guardian has complied with the provisions of the act of May 3d, 1869, 2 Rev. Stat. 1876, p. 593, in regard to the filing of an authenticated copy of his appointment, cannot render the complaint bad on demurrer assigning as cause the want of sufficient facts. *Shook et al. v. The State, ex rel. McCampbell*, 403

4. *Same.—Suit on Guardian's Bond.—Pleading.*—Suit by a foreign guardian of a minor, upon the bond of a former domestic guardian of said minor, conditioned for the faithful discharge of said former guardian's duties as such guardian, and the faithful accounting for, and payment of, all moneys that might arise from the sale of certain lands of his said ward, ordered by the proper court, named, to be sold by said former guardian as such, it being alleged in the complaint that said former guardian, with his sureties, executed said bond, that said proper court ordered the sale of said lands, that, under said order, said former guardian sold said lands, that he received therefor a certain sum of money, that at a certain subsequent term of the proper court, named, he was removed from his guardianship and his letters superseded, and that he converted said money to his own use.

Held, that the complaint was not rendered insufficient by the fact that it did not allege the approval of the bond by the court or the appraisement, required by statute, of the property to be sold.

Held, also, that the allegation that the guardian converted the money to his own use showed a breach of the bond, and was sufficient without alleging in what manner the money was so converted.

Held, also, that the complaint was not insufficient for failing to show a demand, before suit, of the money due.

Held, also, that it was not necessary in such complaint to show that the original bond given by said former guardian upon his taking out letters of guardianship had been exhausted, or that the sureties thereon were worthless. *Ib.*

HIGHWAY.

Obstruction.—Pleading.—In an action under section 24, p. 592, 1 G. & H., for obstructing a highway, the complaint should allege that the defendant "unnecessarily and to the hindrance of passengers," obstructed the highway; and it is not sufficient to allege that he obstructed the highway so as to make it impassable, and so that it could not be travelled and used by the public. *Nowles v. Alter*, 18

HUSBAND AND WIFE.

See PARTIES, 2; WITNESS, 3.

1. *Married Woman.—Separate Real Estate.—Pleading.*—A complaint to enforce against the separate real estate of a married woman an alleged indebtedness contracted by her for its improvement, which does not allege that she intended to, or did, charge or agreed to charge the indebtedness against her separate estate, is insufficient; the fact that she caused necessary and proper improvements to be made on her real estate not raising the inference that she intended to create a charge upon it. *Shannon v. Bartholomew et ux.*, 54
2. *Survivorship.—Choses in Action.*—A promissory note made payable to a husband and wife as the consideration for separate real estate of the wife, upon the death of either of the joint payees, is taken by the other by survivorship. *Abshire et al. v. The State, ex rel. Wilson et ux.*, 64
3. *Credit Given to Wife.—Agency.—Ratification.*—A person furnished and put upon the house of another a lightning rod, at the request of the wife of the latter, without the knowledge or consent of her husband, she having no authority from him to act as his agent in such transaction, or in any business, and not professing to act as his agent in said

transaction, in which no allusion was made to the husband, the account for the work being made out against the wife alone.

Held, that the *prima facie* inference arising from these facts was that the credit was given solely to the wife, and, such inference not having been rebutted, that the husband was not liable for said work.

Held, also, that, the wife having no authority to act as her husband's agent and not professing to so act, the contract could not be ratified by the husband as principal. *Meiners v. Munson*, 138

4. *Separate Property of Wife.—Promissory Note.*—A husband cannot, without the consent of his wife, receive payment of a promissory note made payable to her by a third person, for money, which, being her separate property, has been used or borrowed by her husband, or so made payable to her as a gift of the amount thereof from her husband, such note being her separate property. *Carver v. Carver*, 241
5. *Same.—Payment to Husband.*—Where a husband gets possession, without the consent of his wife, of a promissory note made to her by a third person, and being her separate property, payments made to him, while he has such possession, by the maker, will not discharge the note or any part of it, unless said wife subsequently sanction such payment. *Id.*
6. *Same.—Agency of Husband.—Payment.*—Where a married woman has placed in the hands of her husband, for collection, a promissory note, made to her by a third person, and being her separate property, her husband is not thereby authorized to receive payment in anything but money; and other property received by him cannot be applied as payment, unless his wife has authorized it, or afterwards acquiesces in it; and the burden is on the maker seeking such application to prove such authority or agency. *Id.*
7. *Same.—Trust.*—Where a husband causes a promissory note, given in consideration of the sale and conveyance of his real estate, to be made to his wife, though without her knowledge, and delivers it to her, whether as a gift to her (which, in the absence of anything to the contrary, would be inferred), or for the purpose of repaying her for money or other property of her separate estate used by said husband in the purchase of said real estate, she does not hold said note as the trustee of her husband, so as to render valid as against her a payment thereon made to him, but such note is her separate property. *Id.*

INJUNCTION.

See TAX, 4.

1. *Practice.—Law and Equity.*—Under our code, where a court may enjoin the commission of an act, it may, as a court of equity might have done before the enactment of the code, in the same action and at the same time, grant full relief by rendering judgment for damages already accrued from the commission of such act. *Bonnell v. Allen*, 130
2. *Pleading.—Demurrer.*—Where, in a suit for an injunction and for damages accrued from the commission of the act, against the future commission of which the injunction is sought, the complaint shows a cause of action for such damages, a demurrer thereto for want of sufficient facts should be overruled, though ground for an injunction be not shown. *Id.*
3. *Landlord and Tenant.—Manure.*—Where, upon land demised and used either for cultivation or as a dairy farm, manure has been made during the tenancy, partly from the products of the land and partly from food purchased by the tenant, he, in the absence of any express stipulation on the subject, has the right to use such manure by putting it upon the land, but has no right to remove it from the land as his own property; and a suit for an injunction to prevent such removal will lie

against him in favor of the lessor, who, in the same action, may recover damages for such manure already so removed. *Ib.*

INSTRUCTIONS TO JURY.

See BASTARDY, 5; CRIMINAL LAW, 5; EVIDENCE, 1; REAL ESTATE, ACTION TO RECOVER, 3; SUPREME COURT, 1.

1. *Exception.*—Where general instructions are given by the court to the jury, embracing several distinct propositions, an exception cannot be taken to the entire series by noting at the close thereof an exception as provided in section 325 of the code; but such exception must be noted at the close of each distinct proposition. Such distinct propositions should be numbered as separate instructions, and either party may require that this be done. *Sherlock et al. v. The First Nat'l Bank*, 73
2. *Refusal of.*—There is no error in the refusal of the court to give to the jury an instruction asked by a party, where the substance thereof is included in instructions given. *I. & St. L. R. R. Co. v. Slout, Adm'r*, 143
3. *Assumption of Fact Admitted by Pleading.*—Where, in an action by an administrator, the defendant by his answer has admitted the character in which the plaintiff sues, the defendant cannot object to an instruction to the jury because it assumes the death of the plaintiff's intestate. *Ib.*
4. *Issue not Involved in Verdict.*—Where one of several defences put in issue in an action was fraud, but the jury specially found that there was no fraud, and evidently founded their verdict for the defendant on another ground of defence, there was no available error in the refusal of the court to give to the jury, at the request of the plaintiff, an instruction in relation to fraud. *Woodward v. Begue*, 176
5. *Contract.—Quantum Meruit.*—On the trial of an action, the court refused to instruct the jury, at the request of the defendant, that there could be no recovery under the complaint, which was a common count for services rendered, if there was a contract between the plaintiff and the defendant that such services should be performed by the plaintiff, and that he was to take his pay in the real estate of the defendant when the latter was "done with it."
Held, that there was no error in refusing the instruction, as it did not show sufficiently that it was based on an executory contract subsisting at the time; and if, as evidence introduced tended to prove, the defendant was "done with" his real estate, and had refused to make payment under the contract, before suit, the plaintiff might recover under such complaint. *Chamness v. Chamness*, 301
6. *Evidence.*—It is error for a court, on the trial of an action, to instruct the jury as to the weight of evidence before them. *Ib.*
7. *Request to Instruct More Fully.*—Where an instruction given to a jury is correct as far as it goes, a party desiring that the jury should be more fully instructed should request an instruction embracing his views, and it will not avail him to object that such instruction given does not sufficiently state the law. *Ib.*
8. *Directing Verdict.*—Where, upon the trial of an action by a jury, there is no evidence submitted to the jury which shows a cause of action in the plaintiff, it is the duty of the court to direct the jury to find for the defendant. *Dodge v. Gaylord et al.*, 365
9. *Favorable to Objecting Party.—Refusal to Give Instruction Contained in Charge Given.*—A defendant in a criminal action cannot complain of an instruction given to the jury which is favorable to him, or of the refusal of the court to give an instruction asked by him, where the court in its charge fully and correctly instructs the jury upon the question involved in the instruction refused. *Bissot v. The State*, 408

10. *Incomplete*.—An instruction to the jury which, as far as it is given, is not wrong, will not be held erroneous merely because it is not more complete. *Ib.*
11. *Not Applicable to Evidence*.—It is not erroneous to refuse to give to the jury an instruction asked, though it correctly expresses an abstract principle of law, if there is no evidence in the case to which it is applicable. *Ib.*
12. *Credibility of Witness.—Interest*.—On the trial of a criminal action, it was error for the court to charge the jury, in reference to the testimony of the defendant, who had been a witness in his own behalf, that "one interested will not usually be as honest and candid as one not so." *Greer v. The State, 420*

INSURANCE.

1. *Life Insurance.—Assignment of Policy*.—During the lifetime of a person who has a policy of insurance on his own life, payable after his death to his personal representative, another person, who has no insurable interest in the life of the insured, cannot purchase said policy and take an assignment of it to himself from the insured, and hold the title thereof in himself for his own benefit. *The Franklin Life Ins. Co. v. Sefton, Adm'r, et al., 380*
2. *Same. — Pleading. — Conclusion of Law*.—Action by an administrator upon a policy of insurance on the life of his decedent. Answer by the insurance company, showing that the insured, in his lifetime, assigned the policy to another person, and that the company indorsed upon the assignment its consent thereto. Reply, that the assignee had not any insurable interest in the life of the insured. *Held*, that the reply averred a conclusion of law, and not matter of fact, and was therefore bad on demurrer. *Ib.*
3. *Same.—Forfeiture for Non-payment of Premium.—Evidence.—Statements of Agent*.—A policy of life insurance, by the terms of which renewal premiums were to be paid by the insured annually on a certain day, stipulated that, "in case the first renewal premium shall not be paid at the time it becomes due, then this policy shall be absolutely forfeited;" and upon the policy was indorsed, "Agents of this company will receive premiums when due, but are not authorized in any case to make, alter or discharge contracts." The first renewal premium was not paid until fifteen days after it became due, when it was paid to a person acting as agent of the company. The insured died afterwards, during the second year. On the trial of an action on said policy, brought by the administrator of the estate of the insured, certain letters written by the secretary of said company to the widow of the insured, admitting the liability of the company on the policy, were admitted in evidence on behalf of the plaintiff, over the objection of the company, it not being shown that the secretary had authority to adjust losses, or that he was authorized by the company to write the letters, or that his act in writing them was ratified by the company. *Held*, that the letters were not competent evidence. *Ib.*
4. *Same.—Evidence.—Custom*.—On the trial of such action, the fact that it was the custom or usage of said company to receive payments of premiums after they were due, was not admissible in evidence on behalf of the plaintiff, to control the terms of the policy, or as affording an inference that in the case in question the premium was received by the company after it was due and that the forfeiture was thereby waived. *Ib.*
5. *Same.—Agent.—Ratification*.—Under such a policy, the acceptance of a renewal premium by an agent of the company after it became due could not bind the company, without its ratification of the act. *Ib.*

INTERROGATORIES TO JURY.

See CONSIDERATION, 1.

Motion to Require More Specific Answers.—There is no error in refusing to require the jury to make their answer to an interrogatory more certain and specific, where such answer, if made more certain and specific, could not control the general verdict.

The I. & St. L. R. R. Co. v. Stout, Adm'rs, 143

JUDGE.

See JURISDICTION, 3.

JUDGMENT.

See BASTARDY, 4; GUARDIAN AND WARD, 1; REVIEW OF JUDGMENT.

Form of. See SUPREME COURT, 11.

Offer to Confess Judgment. See PRACTICE, 7.

JUDICIAL DISCRETION.

See CRIMINAL LAW, 15; DIVORCE, 3.

JUDICIAL NOTICE.

See LIQUOR LAW, 1.

JURISDICTION.

See ATTORNEY, 1, 2; CRIMINAL LAW, 4; SUPREME COURT, 10.

1. *Of Person.—Appearance.*—Jurisdiction of the person of a defendant in a civil action can only be acquired by the issuing of summons and the service thereof in one of the modes provided by statute, or by his voluntary appearance in court in person or by attorney and submission to the authority of the court. An appearance is a proceeding in court, and must constitute a part of the record of the cause in which it is entered. *McCormack v. The First Nat'l Bank of Greensburgh et al.*, 466
2. *Same.—Indorsement on Complaint.—Review of Judgment.*—Upon the back of a complaint, in an action of ordinary adversary character, filed in term, was indorsed the following, signed by the defendants in vacation: "We hereby enter an appearance to the foregoing action, and waive the issuing and service of process."
Held, that this did not amount to an appearance of said defendants, and, no summons having been issued, and one of said defendants not having appeared in court in person or by attorney, the court had no jurisdiction of the person of such defendant, and a proceeding to review a personal judgment rendered against him upon said complaint would lie in his behalf, without his having taken an exception to any ruling in the original action. *Id.*
3. *Judge.—Change of Venue.—Attorney Appointed to Act as Judge.*—The act of March 9th, 1875 (2 Rev. Stat. 1876, p. 120), should be construed in connection with section 4 of the act of March 1st, 1855 (2 Rev. Stat. 1876, p. 11); and where, a change of venue having been granted in a criminal action in a criminal court because of an objection to the judge, an attorney is appointed to try the cause under the first proviso of said act of 1875, upon the agreement of the parties entered of record, such appointment should be in writing, and should be entered on the order book, and the appointee should take an oath to support the constitution of the United States and the constitution of this State, and to faithfully discharge the duties of such office; and where objection has been made in such court to the authority of such appointee to act as

judge in such cause, the record on appeal to the Supreme Court must show that these requirements have been complied with; otherwise, the judgment will be held void for want of authority in the judge.

Kennedy v. The State, 542

JURY.

Discharge of Regular Panel.—Interest of Officers Selecting Jury.—Where the circuit court, after the first day of the term, has discharged the regular jury and caused another jury to be summoned, on the ground that one of the officers who participated in the selection of such regular panel is interested in a suit pending in said court, a party to another suit may object to going to trial before such newly-summoned jury and demand that his cause be tried by said original jury, so discharged on motion of an attorney not connected with said other suit.

Hight et ux. v. Langdon, 81

JUSTICE OF THE PEACE.

See COSTS; CRIMINAL LAW, 18; EVIDENCE, 6.

1. *Pleading.—Names of Parties.—Signing Complaint.*—The Supreme Court will not reverse a judgment in a suit commenced before a justice of the peace, for the overruling of a demurrer to the complaint, because it does not contain the full names of the parties and is not signed by the plaintiff or his counsel.

Widup v. Gibson et al., 484

2. *Same.—Action.*—The complaint in an action commenced before a justice of the peace, by its statement of facts, showed a cause of action in favor of the plaintiff against the defendant in replevin and in trover. No writ of replevin was asked or issued, and no bond was filed, but the demand of relief and the writ issued were as in assumpsit for the value of the goods.

Held, that it was proper to treat the action, not as a suit for the recovery of the possession of the goods, but as an action for their value, the tort being waived.

Morford v. White, 547

LANDLORD AND TENANT.

See INJUNCTION, 3.

1. *Nuisance.—Injury to Third Person from Use of Demised Real Estate.*—Where the owner of real estate, on which was a kiln for drying lumber, leased said real estate, receiving rent therefor, knowing that the kiln would be used by the lessee for drying lumber, and knowing or having reason to believe that such use would be dangerous to the neighboring house of a third person, and said house was burned by fire communicated from said kiln in such use thereof by the lessee, said owner was liable to said third person for the injury so occasioned.

Helwig v. Jordan, 21

2. *Occupant Without Contract.—Suit by Owner for Rent.*—Where one occupies land, to which he claims title, but of which he is not the owner, without special contract, or, not being himself in actual possession, leases such land without the consent of the owner and receives rent therefor, the owner may recover the rent from such occupant or lessor, and may maintain an action therefor after having, in another action, obtained judgment quieting his title as against such occupant or lessor.

Winnings v. Wood, 187

3. *Forfeiture.*—Certain real estate being occupied under a written lease reserving rent payable at stated intervals, no place of payment being stated, with a clause of forfeiture upon non-payment of rent as stipulated, the landlord, on a day on which rent became due, but not just before sun-set, at the tenant's place of business, but not on the demised premises, demanded of the tenant the rent due, in general terms, with-

out specifying the amount. The tenant then refused payment, but the next day the rent was paid by the tenant and received and accepted by the landlord, who then gave the tenant notice in writing to quit the premises, which the tenant refused to do.

Held, that the landlord could not recover possession upon the ground of a forfeiture for non-payment of rent upon the day on which it was due.

Bacon v. The Western Furniture Co., 229

LIBEL.

1. *Pleading.—Publication.*—A complaint for libel alleged that the defendant, on, etc., at, etc., maliciously intending, etc., “did write, print and publish, and cause to be written, printed and published in a certain newspaper, called,” etc., a certain false, etc., libel, of and concerning the plaintiff, etc.

Held, on demurrer, that it was not necessary to allege that said newspaper was a circulating newspaper, or to aver in detail the manner or extent of the publication, and that the publication was sufficiently alleged.

The Indianapolis Sun Co. v. Horrell, 527

2. *Damages.*—For a libel charging that the plaintiff was a recently-released penitentiary convict, damages in the sum of eight hundred dollars were held not excessive. *Ib.*
3. *Malice.*—A libel must be malicious, but malice may be inferred from its wrongful and intentional publication. *Ib.*

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LIQUOR LAW.

See CONSTITUTIONAL LAW, 1; CONTRACT, 2; CRIMINAL LAW, 2, 3; EVIDENCE, 8; WITNESS, 3.

1. *Intoxicating Liquor.—Whiskey.—Judicial Knowledge.*—Courts and juries take notice that whiskey is an intoxicating liquor, without proof of the fact; and it is not error for the court in a proper case to charge the jury that proof of a sale of whiskey is proof of a sale of intoxicating liquor. *Eagan v. The State*, 162
2. *Appeal by Remonstrants.—Effect of Appeal.*—An appeal by remonstrants from an order of a board of county commissioners granting a license to sell intoxicating liquors in a less quantity than a quart at a time, under the liquor law in force in 1870, suspended the operation of said order; and during the pendency of such appeal the applicant could not lawfully so sell such liquors. *Mullikin v. Davis, Adm'r*, 206
3. *Selling Intoxicating Liquor to Minor.—Affidavit.*—In a prosecution by affidavit, under section 13 of the liquor law of 1875 (Acts 1875, Spec. Sess. 55), for unlawfully selling intoxicating liquor to a minor, the affidavit was not rendered bad by the fact that the liquor alleged to have been sold was described therein as “intoxicating liquor,” and not as either spiritous, vinous or malt liquor. *The State v. Hannum*, 335
4. *Act of 1873.—Section 8.—Compensation for Taking Care of Intoxicated Person.*—Section 8 of the act of February 27th, 1873, Acts 1873, Reg. Sess. 151, which provided that any person who should, by the sale of intoxicating liquor, cause the intoxication of another, should be liable “to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person,” must be construed as authorizing a recovery only for the time during which such person may have remained intoxicated. *Krach et al. v. Heilman*, 517
5. *Same.—Section 12.—Injury in Consequence of Intoxication.—Proximate Cause.*—Where a person, by selling intoxicating liquor to another,

caused the intoxication of the latter, so that he became insensible and unable to take care of himself, and while in that condition, in going home, lying down in his wagon in consequence of his intoxication, he received an injury from a barrel which was in said wagon, and, if he had not been intoxicated, he would not have received said injury, from which he died;

Held, in an action by his widow, who by his death was injured in her means of support, against said seller, that she was not injured "in consequence of the intoxication," and was therefore not entitled to recover under section 12 of said act of 1873. *Ib.*

MAINTENANCE.

Contract.—By a contract between A. and B., the former agreed to pay the latter, or order, or bearer, a certain sum "as soon as a certain case or dispute" should be decided between A. and C., wherein C. claimed damages of A., if B. should manage said case, "as he has done," and a suit should be commenced, and B. should, by himself and counsel, defend said cause, all at his own expense, and A. should have no damages to pay; said sum to be paid when said claim should be settled by law or otherwise, in favor of A., and nothing to be paid if A. should have any damages to pay. Suit on said contract against A. by B.'s assignee, the complaint alleging the execution and assignment thereof; that, at the time of its execution, B. was acting as the agent of A.; that B. had faithfully performed his part of the contract; that said suit and dispute mentioned therein had been settled and determined in A.'s favor; that B., by himself and attorney, had managed and defended said cause at B.'s expense; that A. did not have any damages or costs to pay, etc.

Held, on demurrer to the complaint, that the contract was void for maintenance. *Quigley v. Thompson, 317*

MANDATE.

See TAX, 2.

MANURE.

See INJUNCTION, 3.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See NEGLIGENCE, 2.

MERGER.

See PRINCIPAL AND SURETY, 4.

MINOR.

See PARTIES, 2; REVIEW OF JUDGMENT, 3.

MISJOINDER.

See REAL ESTATE, ACTION TO RECOVER, 1, 2.

MORTGAGE.

See PLEADING, 16.

1. *Acceptance of*.—A mortgage does not become a lien until the date of its acceptance by the mortgagee or his agent for him.

Evans v. White, Adm'r, 1

2. *Defective Description of Note.*—In a suit on a promissory note and to foreclose a mortgage on real estate given to secure said note, the note and mortgage being filed with the complaint and made part thereof, the note so filed, which was read in evidence on the trial, did not correspond with the description of the note in the mortgage.
Held, that the note so pleaded and proved controlled and cured the defective description in the mortgage. *Cleavenger et al. v. Beath*, 172
3. *Action to Quiet Title.—Recording of Mortgage.—Subsequent Purchaser.*—A complaint to quiet title to real estate alleged, that an owner thereof conveyed it with full covenants to the plaintiff and put him in possession thereof; that the defendant was asserting title thereto through a subsequent conveyance thereof to him made by the governor in pursuance of a sale by the auditor of state under a mortgage of said real estate executed to the treasurer of state by one who owned it before the plaintiff's grantor became such owner; that though said mortgage had been recorded in the county, before the plaintiff's grantor became the owner of the real estate, yet it had never been acknowledged by the mortgagor, nor was its execution ever proved, to entitle it to be recorded; and that the plaintiff had no notice of said mortgage until after said sale and conveyance to the defendant. Prayer, that the plaintiff's title be quieted, etc.
Held, that the complaint was sufficient. *Watkins v. Brant et al.*, 208
4. *Reformation of.—Junior Mortgage.*—A mortgagee may have his mortgage reformed, by the correction of a mistake in the description of the real estate intended to be mortgaged, as against a junior mortgagee, whose mortgage was taken, without notice of such mistake, as a security for an antecedent debt, without the surrender of any old security and without any new consideration moving between the parties, but merely to secure a new note given for the amount of old ones taken up.
Busenbarke, Ex'r, v. Ramey et al., 499

MUNICIPAL CORPORATION.

See BOND, 1, 2.

NEGLIGENCE.

See DAMAGES; PLEADING, 17; RAILROAD, 2.

1. *Death Caused by Wrongful Act.—Unusual Care.*—In an action to recover damages for the death of a person caused by the wrongful act of the defendant, it was held that the failure of such person to be cool and collected, and to act with perfect prudence and in the exercise of a deliberate judgment, in the presence of an unexpected and deadly danger—to take *unusual* care—constituted no defence to such action.
The I. & St. L. R. R. Co. v. Stout, Adm'r, 143
2. *Master and Servant.—Negligence of Servant. — Parties.*—For an injury resulting from the carelessness or negligence of a servant, while in the performance of his master's business, to a third person, the master is liable, and also the servant, and they may be joined as defendants in an action to recover damages for the injury. *Wright et al. v. Compton*, 337
3. *Injury from Unlawful Act.*—Where a person, in quarrying stone, near a public highway, by a blast of gunpowder, threw fragments of stone against a traveller passing on said highway, whereby he was injured, the act which caused the injury being unlawful, the recovery of damages for the injury could not be defeated by the fact that there was no negligence on the part of the person who did said act. *Ib.*
4. *Pleading.*—In an action to recover for an injury caused by negligence or carelessness, whether it be an injury to the person or an injury to property, the complaint must show by direct averment, or it must appear from the facts therein alleged, that the plaintiff, or party

injured, was himself guilty of no negligence which contributed to the injury.
The L., N. A. & C. R. W. Co. v. Boland, 398

NEW TRIAL.

See CRIMINAL LAW, 10; PRACTICE, 1, 5; RECORD, 1; SUPREME COURT, 2.

1. *Motion.—Striking Out Pleading.*—Error in striking out a pleading is not a cause for a new trial.
Marshall v. Beeber et al., 83
2. *Demurrer.*—Error in ruling upon a demurrer to a pleading cannot be a cause for a new trial.
I. & St. L. R. R. Co. v. Stout, Adm'r, 143
3. *Complaint for New Trial.—Newly-Discovered Evidence.—Cumulative Evidence.*—Where, on the trial of an action, admissions of a party tending to show his liability in such action have been proved, proof of other admissions made by him having the same tendency is cumulative evidence, and the discovery of such evidence after the term at which the verdict or decision was rendered cannot support a complaint for a new trial.
Cox v. Harvey, 174
4. *Same.—Surprise.—Diligence.—Attorney.*—Where a party to an action, being sick, was absent from the trial thereof, knowing the issues, and not having asked a continuance, but having entrusted the management of his cause to his attorney, and, in a complaint for a new trial, on the ground that he was surprised by the evidence of the adverse party, alleged that he was not informed of such evidence till after the term, but did not show that, by the use of diligence, his attorney could not have informed him;
Held, that the complaint was bad for its failure to show reasonable diligence.
Ib.
5. *Newly-Discovered Evidence.*—A new trial should not be granted in a criminal action on the ground of the discovery of new and material evidence by the defendant after the trial, where the evidence discovered is not so material that it would, with any certainty, produce or justify any different result from that reached on the former trial.
Rainey v. The State, 278
6. *Surprise.*—A new trial will not be granted to the defendant in a criminal action, on the ground of surprise in the testimony of a witness, where the testimony alleged to be a surprise is immaterial.
Bissot v. The State, 408
7. *Newly-Discovered Evidence.*—A new trial will not be granted because of newly-discovered evidence, where no diligence is shown, and no reason why the evidence was not discovered sooner, and no reasonable probability that it can be produced.
Ib.
8. *Motion.—Evidence.—Instructions to Jury.*—A motion for a new trial on the ground of the admission or exclusion of evidence must point out the evidence in question; and a motion for a new trial on the ground of the giving or the refusal to give instructions to the jury must point out the instructions in question.
Bowers et al. v. Bowers, 430
9. *Newly-Discovered Evidence.*—A motion for a new trial, on the ground of newly-discovered evidence, was properly overruled, where it was not shown what diligence was used to discover the evidence before trial, and there was no affidavit made by a party to the action, and the newly-discovered evidence was only cumulative.
Ib.
10. *Motion.*—A motion for a new trial on the ground of irregularities upon the trial must distinctly specify the particular irregularities complained of.
Grose v. Dickerson, 460
11. *Criminal Action.—Misconduct of Juror.—Evidence.*—Where a motion for a new trial in a criminal action is based upon alleged misconduct of a juror, in falsely stating, on his examination under oath as to his competency as a juror, that he had not formed or expressed any opinion as

to the guilt or innocence of the defendant, and, such alleged misconduct being controverted, the evidence, either oral or written, offered on this point to the court in connection with the motion, is conflicting, the question of such alleged misconduct should be determined upon the weight of the evidence; and the Supreme Court will respect the conclusion arrived at, as it does the decision of a question of fact upon conflicting evidence in a civil action. *Holloway v. The State*, 554

12. *Application for, When and How Made.*—An application for a new trial in a civil action cannot be made except by motion, upon written cause filed at the time of making the motion, and the application must be made at the term at which the verdict or decision is rendered, except it be for cause discovered afterwards; and the court cannot, without the agreement or waiver of the parties, grant time beyond the term to make the application, for a cause other than one discovered afterwards. But when a trial is pending at the close of the term, the court may proceed with it until it is concluded, and the additional time thus required will be held to be within the legal term.

Krutz v. Craig, Adm'x, 561

NUISANCE.

See LANDLORD AND TENANT, 1.

OFFICE AND OFFICER.

See SHERIFF.

Profit Derived by Officer from Public Money in his Custody.—In this State, a public officer, as a county treasurer, who has received public money, with the custody of which he is charged by virtue of his office, in the absence of a statute providing that the ownership of the specific money shall remain in the public, is not, like a trustee or an agent, the mere bailee or custodian of such money, but it becomes his own money, and he can only be required to account for it and pay it over as provided by law and by the terms of his official bond, and cannot be required to account for and pay over amounts collected or received by him as interest on such money loaned to or deposited with a bank.

Shelton v. The State, ex rel. The B'd of Comm'rs of Morgan Co. et al., 331

OFFICIAL BOND.

See COUNTY TREASURER; PLEADING, 7; SHERIFF.

Liability of Surety.—County Auditor.—A county auditor, as such, fraudulently issued an order, payable to himself, on the county treasurer, for a balance of fees falsely pretended therein to have been allowed him as auditor by the board of county commissioners, and presented it to said treasurer, who indorsed it, "Not paid for want of funds." And said auditor afterwards presented it to a bank, which, in good faith, relying on the genuineness of the order, and without notice of its fraudulent character, advanced money to the auditor upon the deposit of said order as security therefor, which money becoming due and being unpaid, the bank demanded of said treasurer payment of said order, which he refused.

Held, in an action, brought by said bank as relator, upon the official bond of said auditor, conditioned for the faithful and impartial discharge of the duties of his office according to law, that the act which resulted in damage to the relator, being the presentation to it of the order and the obtaining of said money thereby, was not an official act, and the sureties on said bond were not liable for said damage. WORDEN and PETTIT, JJ., dissented.

The State, ex rel., etc., v. Kent et al., 112

PARTIES.

1. *Demurrer.—Answer.—Promissory Note Assigned Without Endorsement.*—Where a promissory note has been assigned, but not by endorsement, the payee should be made a party defendant in an action on the note by the assignee; but if the payee be not made a party, objection to such defect of parties apparent on the face of the complaint cannot be taken by demurrer assigning insufficiency of the facts stated or by answer, but must be taken by demurrer assigning defect of parties defendants. *Clough et al. v. Thomas et al.*, 24
2. *Petition to be Made a Party.*—Where such a defect of parties was apparent on the face of a complaint on a promissory note, and objection thereto was not properly taken by the defendant, it was error to refuse to permit the payee to become a party upon her petition alleging that the note was executed to her, that she had been and still was the owner thereof, and that it had been transferred by her husband without authority from her, she being at the time a minor and a married woman. *Ib.*
3. *Rule of Court.*—The fact that such an application to be admitted as a party was made too late under a rule of court could not affect the application, the petitioner not being a party. *Ib.*
4. *Decedents' Estates.—Administration.*—The widow of a deceased payee of a promissory note, the other heirs having assigned said note by indorsement to her, there being no debts of the decedent to be paid, and the estate having been settled without administration, may maintain an action in her own name on said note. *Mitchell v. Dickson et al.*, 110

PARTITION.

See REVIEW OF JUDGMENT, 3.

PARTNERSHIP.

See CONTRACT, 5.

1. *Real Estate.*—In order that real estate purchased by partners may be treated as not subject to sale as real estate to satisfy the personal debt of one of the partners during the continuance of the partnership and until all partnership debts have been paid, it must have been purchased for partnership purposes. *Morgan et al. v. Olvey et ux.*, 6
2. *Suit Against Surviving Partner by Personal Representative of Deceased Partner.*—A complaint by the administrator of the estate of a deceased partner, against the surviving partner, to recover the value of assets of the partnership, which the defendant has refused to account for, misapplied and converted to his own use, should contain proper traversable averments that the partnership debts have been paid, that the affairs of the partnership have been finally settled, and that the shares of the partners have been ascertained, and should show a demand made, or a proper excuse for not making a demand, before the bringing of the action. *Krutz v. Craig, Adm'x*, 561

PATENT.

1. *State Legislation.*—No state legislation should be so construed as to interfere with the enjoyment of property in inventions, as secured by letters-patent of the United States, or to annex conditions to such a grant. *The Grover & Baker Sewing Machine Co. v. Butler*, 454
2. *Act Respecting Foreign Corporations and their Agents.*—The provisions of the act "respecting foreign corporations and their agents in this State" (1 Rev. Stat. 1876, p. 373) do not apply to a foreign corporation which is the owner, either as patentee or as assignee, of letters-patent issued by the United States, or to its agents in this State, in its

transactions in this State, connected with the manufacture, use or sale of the invention described in such letters-patent. *Ib.*

PAYMENT.

See HUSBAND AND WIFE, 5, 6, 7; PLEADING, 4, 10; PROMISSORY NOTE, 3, 4.
Compulsory Payment. See SHERIFF.

PLEADING.

See CONTRACT, 3; CORPORATION, 7, 8; COUNTY TREASURER; DAMAGES; DECEDENTS' ESTATES, 1, 2; DEMURRER; EVIDENCE, 1, 9; FRAUD, 3, 4, 5; HIGHWAY; HUSBAND AND WIFE, 1; INJUNCTION, 2; INSURANCE, 2; JUSTICE OF THE PEACE, 1, 2; LIBEL, 1; NEGLIGENCE, 4; PARTIES, 1; PROMISSORY NOTE, 2, 7; RAILROAD, 1, 2; REAL ESTATE, ACTION TO RECOVER, 3; REVIEW OF JUDGMENT, 1, 2, 5, 6; SET-OFF, 1, 2; SUPREME COURT, 3.

1. *Immaterial Matter.*—A complaint in which facts constituting a cause of action have been alleged cannot be made stronger by an averment that the defendant represented the facts to be as so alleged, and such an averment may be struck out as immaterial on motion.

Evans v. White, Adm'r, 1

2. *Duplicity.*—Material matter which renders a pleading double should be struck out on motion. *Ib.*

3. *Departure.*—Complaint for money paid, laid out and expended by the plaintiff for the defendant, at his special instance and request, a bill of particulars filed with the complaint being an account for a certain amount of corn purchased at a certain price.

Held, that a reply claiming for money paid by the plaintiff to satisfy a purchaser for a contemplated non-performance of a contract for the delivery of corn by the defendant to such purchaser was not a departure.

Godman et al. v. Meixsel et al., 11

4. *Action on Judgment.—Answer.—Payment.—Collaterals.*—In an action upon a judgment, under a general answer of payment, proof may be made that the plaintiff has received the amount of certain collaterals placed in his hands, or that he has become chargeable therewith, as payment on the judgment; and, therefore, in such an action, there is no error in striking out of a paragraph of answer such special matter of defence, or in sustaining a demurrer to a paragraph of answer which relies thereon, where there remains such a general answer of payment.

Wolcott v. Ensign, 70

5. *Striking Out Pleading.*—There is no error in striking out a paragraph of answer, when all the evidence admissible thereunder may be given under a remaining paragraph.

Vawter v. Franklin College, 88

6. *Action to Recover Possession of Real Property.—Answer.—Cross Complaint.*—Where, to a complaint for the recovery of the possession of real estate, there is an answer of general denial, there can be no error in striking out or sustaining a demurrer to another paragraph of answer alleging only matter of defence, every defence, whether legal or equitable, being admissible in evidence under such denial; but the specific performance of a parol contract for the sale and conveyance of said real estate, made between the plaintiff's grantor, he being the owner thereof, and the defendant, and partly performed by said grantor's putting the defendant in possession of the real estate, the making of valuable and lasting improvements thereon by the defendant, and his performance of the consideration, the plaintiff, with knowledge of said contract, having afterwards received his deed of conveyance of said real estate from said grantor, cannot be obtained, and the defendant's title cannot be quieted, under such answer of denial; but such affirmative

relief may be granted under a special answer and cross complaint alleging such facts, and proof thereof. *Emily v. Harding*, 102

7. *Statute Containing Exception or Condition.—Suit on Constable's Bond.*—A complaint on the official bond of a constable, under section 9 of the act in relation to constables, 2 G. & H. 617, for his failure to do his duty in making a levy of an execution as required by the sixth clause of section 3 of said act, which does not allege that property could be found by the constable on which to make a levy, or that the constable was not directed by the plaintiff or his agent not to make a levy, is insufficient. *Montgomery et al. v. The State, ex rel. Southard*, 108
8. *Striking Out Pleading.*—Complaint for the value of goods sold and delivered by the plaintiff to the defendant. Answer, that there was a defect of parties, in that the plaintiff had no interest in the cause of action; that said goods were sold by the plaintiff to a third person named, and by him to the defendant; and that the defendant never purchased of the plaintiff any portion of said goods.
Held, that there was no error in striking out this answer on motion, there being an answer of general denial remaining. *Marshall v. Beeber*, 119
9. *General Denial.—Estoppel.*—Where, in an action brought by an assignee, on a note not payable in bank, executed by two persons, one of the makers answered fraud and want and failure of consideration, and there was a reply of the general denial only, the defendant pleading such answer could not be debarred from setting up such defences by the fact that, after the execution of said note, he being surety thereon, he used and appropriated another note received by him or his principal, in consideration of said note sued on, by indorsing and delivering said other note to a bank, in payment of another note of said principal held by the bank, on which said surety was indorser, and thus carried out the original intention of the parties to the note in suit, and availed himself of all its advantages to him. *Woodward v. Begue*, 176
10. *Payment.—Special Finding.*—Where, in an action upon a money demand on contract, there has been no answer of payment, the court, in its conclusions of law upon a special finding of the facts showing partial payment, cannot allow such payment.
The Town of Cicero v. Clifford et al., 191
11. *Exhibits.*—Where a written instrument, made an exhibit to a complaint, does not constitute the foundation of the action, it cannot supply necessary averments of the complaint, or be noticed as a part thereof.
Watkins v. Brunt et al., 208
12. *Answer.*—A paragraph of pleading filed by a defendant cannot be regarded both as a pleading alleging a defence and as a pleading seeking affirmative relief.
McMannus et al. v. Smith, 211
13. *Counter-Claim.—Action for Recovery of Real Property.*—In an action for the recovery of the possession of real estate, a pleading filed by the defendant alleged that he was the owner in fee simple of the real estate, describing it, and that the plaintiff was claiming and pretending to hold some interest therein as heir-at-law of a person named, and was endeavoring to dispossess the defendant, which claim was a cloud upon his title. Prayer, that the defendant's title be quieted and that the plaintiff be enjoined from setting up his claim.
Held, that this pleading was a counter-claim, and was sufficient to authorize the relief sought. *Ib.*
14. *Pleading Title.—Fee Simple.*—In pleading title in fee simple, it is only necessary to simply state it, without alleging its derivation; and if a party pleading such title, in alleging his chain of title, leaves some of the links blank, this will not vitiate his pleading. *Ib.*
15. *Variance and Amendment.—Promissory Note.*—Where a complaint on a promissory note alleges it to be payable at a certain period after date,

and the copy of the note filed with the complaint shows it to be payable at a certain other period after date, the pleading may be regarded as amended so as to avoid the variance. *Carver v. Carver*, 241

16. *Reformation of Written Instrument. — Mortgage.* — A mortgage of real estate could not be reformed as to the description of the mortgaged premises, and foreclosed as reformed, upon a complaint, which, proceeding as upon the mortgage as executed, afterward merely alleged "said premises" to be a tract, the description of which was given, differing from the description in the mortgage, and asked that the mortgage might be reformed to correspond with the latter description.
Barnaby et al. v. Parker, 271
17. *Injury or Death from Wrongful Act or Omission.* — A complaint for the death of a person caused by the wrongful act or omission of the defendant is bad on demurrer, if it is not alleged therein that the person killed was not guilty of negligence contributing to his injury, or that he was without fault, and the facts alleged do not show that he was not guilty of such negligence, and it is not alleged that the defendant caused the injury wilfully or purposely, though it be alleged that the defendant inflicted the injury recklessly and with gross negligence.
The C. & M. R. R. Co. v. Eaton, Adm'r, 307
18. *Demand.* — In an action upon a written contract for the payment of money at a time and place specified therein, the complaint will not be rendered bad on demurrer by a failure to allege therein a special demand of payment made upon the promisor before the commencement of the action. *Higert v. The Trustees of Ind. Asbury University*, 326
19. *Allegation that Claim Remains Unpaid.* — In an action upon a written agreement to pay money, it must appear from the complaint that the sum demanded remains unpaid; but in a complaint upon a subscription of money to the building fund of a college, this requirement was sufficiently complied with by an allegation that, "though often requested, the defendant has failed and refused and still fails and refuses to pay the same or any part thereof." *Ib.*
20. *Counter-Claim.* — Where it appears from the facts alleged in an answer that it contains a statement of new matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the defendant, this need not also be directly averred, to constitute a counter-claim.
Gilpin v. Wilson, 443
21. *Same. — Action to Recover Real Estate. — Sheriff's Sale. — Counter-Claim. — Demurrer.* — Action for the recovery of the possession of real estate. Answer by way of counter-claim, seeking to quiet the defendant's title to said real estate, by setting aside a sale thereof made to the plaintiff by the sheriff under an execution issued on a judgment in favor of the plaintiff against the defendant, it being alleged that before said sale the defendant pointed out and surrendered to the officer who held said execution for collection personal property to be levied on and sold by him under the execution, of a certain value, and sufficient to satisfy the execution, which the plaintiff knew, but that said officer, confederating with the plaintiff to injure the defendant, refused and neglected to accept said personal property, and, in lieu thereof, without the knowledge or consent of the defendant, levied on and sold for a certain sum to the plaintiff the real estate in question, under said execution; that said real estate consisted of a farm of a certain number of acres; that it was susceptible of division into, etc., several portions, each of which was worth more than said sum bid by the plaintiff, and more than sufficient to satisfy said execution; but that said officer, confederating with the plaintiff as aforesaid, advertised the whole tract for sale and sold it as a whole, as aforesaid, without offering it in the subdivisions into which it was divisible as aforesaid; and the defendant offered to

pay the purchase-money and ten per cent. interest thereon and all costs, or such sum as the court might find due to the plaintiff.

Held, that it was not necessary to make an exhibit of the judgment, etc., on which the sale was made.

Held, also, that the answer was good on demurrer.

Held, also, that if the facts alleged in the counter-claim might have been given in evidence under the general denial, which was also pleaded, yet the sustaining of a demurrer to the counter-claim was an available error. *Ib.*

22. *Demurrer.—Form of Action.*—If a complaint states any cause of action in favor of the plaintiff against the defendant, it will be held good on demurrer assigning want of sufficient facts, without regard to the question as to what the form of action would have been at common law.

Grose v. Dickerson, 460

23. *Same.—General Denial.*—There can be no available error in sustaining a demurrer to a paragraph of answer, where every purpose it could accomplish is served by a remaining paragraph of general denial. *Ib.*

24. *Set-Off.—Tort.*—An answer of set-off pleaded to a complaint in tort is bad on demurrer. *Ib.*

25. *Demurrer.—Waiver.*—Where a plaintiff replies to a paragraph of answer, after the sustaining of a demurrer thereto filed by him, and, the demurrer being thus waived, the defendant has the full benefit of such paragraph, he cannot complain of the ruling on the demurrer. *Ib.*

26. *Performance.*—Where a pleading is based upon an agreement, either as a cause of action or as matter of defence, performance or a sufficient excuse for non-performance of the stipulations to be performed by the party so relying on the agreement must be averred.

Armstrong et al. v. Rockwood, 506

POWER.

See VENDOR AND PURCHASER, 4.

PRACTICE.

See ARREST OF JUDGMENT; BILL OF EXCEPTIONS; CONTINUANCE; DEMURRER; GUARDIAN AND WARD, 1; INJUNCTION, 1; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JURISDICTION; PROMISSORY NOTE, 2; REVIEW OF JUDGMENT; SUPREME COURT; U. S. COURT, REMOVAL OF CAUSE TO.

1. *Continuance.*—Where the court has improperly refused to grant a continuance, the ruling must be made a ground of a motion for a new trial, in order to present the question to this court, and then it must be done by assigning as error the overruling of the motion for a new trial.

Arbuckle et al. v. McCoy, 63

2. *Substituted Papers.—Clerk.*—Authority to order or allow the filing of substituted papers belongs, not to the clerk, but to the court.

Everett v. Gooding, 72

3. *Judgment on Special Finding, Notwithstanding General Verdict.*—Special findings in answer to interrogatories override the general verdict only when both cannot stand; and the Supreme Court will not direct judgment in favor of a party against whom the general verdict has been rendered, unless this antagonism is apparent on the face of the record, and the special finding cannot, by any hypothesis, be reconciled with the general verdict. *The I. & St. L. R. R. Co. v. Stout, Adm'r*, 143

4. *Same.—Construction of Section 337 of the Code.*—The inconsistency contemplated by section 337 of the code, because of which the special finding shall control the general verdict, is the inconsistency of the special finding of facts, taken as a whole, with the general verdict, or the

- exclusion, by the facts found in one or more of the answers to interrogatories, of every conclusion that will authorize the general verdict. *Ib.*
5. *New Trial.—Evidence.—Special Finding.*—A new trial will be granted for want of evidence to support a special finding of facts by the jury in answer to interrogatories, only when it would be granted for insufficiency of the evidence to support the general verdict. *Ib.*
 6. *Venire De Novo.*—Where a verdict is certain, responsive to the issues, and decides the whole case, a motion for a *venire de novo* will not be sustained. *Woodward v. Begue, 176*
 7. *Offer to Confess Judgment.*—Before the trial of a pending action, the defendant offered in writing “to confess judgment for” a certain sum, “with costs accrued to the present time” in said cause; and the plaintiff declined to accept said offer, and on the trial there was a finding for the plaintiff for a smaller sum.
Held, that said offer was sufficient, and that the judgment was properly rendered for the amount of the finding with costs accrued up to and including the day on which said offer was made. *Rose v. Grinstead, 202*
 8. *Trial in Absence of Defendant.*—Where a cause at issue has been reached for trial, and the defendant and his attorney are absent, it may be submitted to the court for trial of the issues joined, without the intervention of a jury, without calling the defendant.
The Indianapolis Piano Manuf'g Co. et al. v. Caven, 258
 9. *Same.—Relief from Neglect, etc.*—Prior to the adjournment of a court for a holiday recess, an attorney for the defendant in a cause, which he knew was the next cause for trial, informed the court, in the hearing of the plaintiff's counsel, that he would be absent during the recess, and could not return until an hour after the usual time for the meeting of the court; and upon the meeting of the court, pursuant to adjournment, the defendant and his attorney being absent, the court required that said cause be tried or passed; and the plaintiff's attorney having notified the resident partner of said defendant's attorney that said cause had been called for trial, and said partner, who, as was afterwards shown, was not prepared in said cause, having refused to appear, the plaintiff's attorney submitted the cause to the court for trial; and said defendant's attorney, upon his arrival at the hour so announced by him, found that the cause had been tried, and that a finding had been rendered for the plaintiff.
Held, upon affidavits showing these facts and a partial defence, that the defendant was not entitled to any relief. *Ib.*

PRESUMPTION.

See FORMER ADJUDICATION; PROMISSORY NOTE, 5; SUPREME COURT, 12.

PRINCIPAL AND AGENT.

See CANAL, 4; CONTRACT, 1; EVIDENCE, 3; HUSBAND AND WIFE, 3, 6; INSURANCE, 5.

1. *Special Agent.—Authority to Sign Note.*—Where a person authorizes another to sign the name of the former to a promissory note for a specified sum, the payee will be charged with knowledge of the extent of such authority, and the person conferring it cannot be bound for a larger sum. *Blackwell v. Ketcham, 184*
2. *Attorney.—Ratification.*—An account having been placed in the hands of an attorney by the creditor for collection, and the attorney having presented it to the debtor for payment, the debtor afterwards paid a part of the claim to another person who occupied the same office with said attorney, and who gave a receipt for the money so paid, signed by him as for said attorney, but who had no business connection with said

attorney, and had no authority from him or from said creditor to receive said payment, which act was not ratified by said creditor, but was ratified by his said attorney, who never received the money so paid, and who afterwards repudiated said act, on learning that his client had never received the money so paid.

Held, in an action on said account, that the creditor was not bound by said payment. *O'Conner v. Arnold et al.*, 203

3. *Real Estate Broker*.—Where an owner of certain real estate agreed with a broker, that if the latter would “find a purchaser, or make a sale of said real estate,” said owner would pay said broker, for his commission, a certain sum; and, in pursuance of said agreement, the broker effected a bargain and sale of said real estate, by a contract which was mutually obligatory on said owner as vendor and a third person as vendee, the broker was entitled to said commission, though the vendee afterwards refused to execute his part of said contract of sale.

Love et al. v. Miller et al., 294

PRINCIPAL AND SURETY.

See COUNTY TREASURER; OFFICIAL BOND; SHERIFF.

1. *Extension of Time of Stay of Execution.—Appeal Bond.—Burden of Proof*.—Upon an appeal from a justice of the peace by the defendant, judgment was rendered against the defendant for a certain sum, being more than five dollars less than the amount of the judgment rendered against him by the justice, and, including costs, which were adjudged against the defendant, less than one hundred dollars, it being further adjudged that execution should not issue until the expiration of six months, said judgment being rendered by agreement of parties, without the knowledge or consent of the surety on the appeal bond.

Held, that such extension of the time of stay of execution discharged said surety.

Held, also, in an action on said appeal bond, the surety relying on such defence, that the burden of proving that he had notice of said extension and consented thereto was upon the plaintiff. *Wingate v. Wilson*, 78

2. *Guardian's Bond*.—In an action on a guardian's bond, it is not a sufficient defence for a surety, that he signed the bond on the express condition that the principal obligor, before delivering it to the clerk, would have it signed by one or more other good, solvent men, as sureties with him, which was not done.

Hunt et al. v. The State, ex rel. Martin et ux., 321

3. *Same.—Fraud.—Pleading*.—In such an action, an answer by a sole surety is insufficient, which alleges that the bond was obtained from him by the principal obligor by fraud, covin and misrepresentation, by his stating that it should not be delivered to the clerk or to the judge, until it was executed by one or two other good, solvent persons as sureties. *Ib.*

4. *Extension of Time of Payment.—Alteration of Written Instrument*.—Where, by agreement between the maker and payee of a promissory note bearing eight per cent. interest, without the knowledge or consent of a surety thereon, in consideration that the payee would extend the time for the payment of the note for an indefinite period after its maturity, until he should demand payment, the maker endorsed on the note the following: “I hereby agree to pay ten per cent. interest on this note hereafter,” dated the day before the maturity of the note, and signed by the maker; and, in pursuance of the agreement, the payee did extend the time for a long period after the maturity of the note;

Held, that the new contract, viewed as a contract for the extension of time, did not discharge the surety.

Held, also (BIDDLE, J., dissenting), that said agreement endorsed on the

note was not a merger and abrogation of the contract contained in the note in respect to the payment of interest, or such an alteration of the original contract as would discharge the surety in an action on the original contract.

Bucklen v. Huff, 474

5. *Alteration of Note.—Spoliation.—Negligence of Payee.*—Where, a short time before the maturity of a promissory note bearing eight per cent. interest, the payee required the payment of ten per cent. interest for such time as the note should run after maturity; and the maker thereupon altered said note, so as to make it stipulate that it should bear interest at the rate of ten per cent., instead of eight per cent.; and the payee, being unable to write or read writing, and having no knowledge of the alteration thus made, and not assenting thereto, received the note again from the maker and retained it after maturity, receiving from the maker the increased rate of interest, without knowledge of said alteration or assent thereto;

Held, that the alteration was a mere spoliation of the note, and did not affect the payee's right to recover on the note as it existed before the spoliation, against a surety thereon, and the payee could not be regarded as guilty of such negligence as would deprive him of such right to recover.

Id.

6. *Notice of Surety Requiring the Institution of Suit.*—A surety upon a contract in writing, on which the right of action has accrued, cannot avail himself of the remedy provided by sections 672 and 673 of our code of practice, by giving notice in writing to an attorney of the creditor or obligee directing such attorney forthwith to institute an action upon the contract.

Driskill v. The Board of Commissioners of Washington Co., 532

PROMISSORY NOTE.

See CONSIDERATION, 1; CONTRACT, 2, 3; EVIDENCE, 6; HUSBAND AND WIFE, 4 to 7; PARTIES, 1, 2; PLEADING, 15; PRINCIPAL AND SURETY, 4, 5.

1. *Payable in Bank.—Locality of Bank Not Stated.*—Where a promissory note is made in this State, payable at a bank named, the locality of the bank not being stated, in an action on the note in a court of this State, the bank will be presumed to be located in this State, unless the contrary appears, and, therefore, on demurrer to the complaint, the note will be regarded as negotiable by the law merchant.

The Indianapolis Piano Manufacturing Co. et al. v. Caven, 258

2. *Pleading.—Striking Out Relevant Matter.*—In an action on a promissory note stipulating for ten per cent. attorney's fees if suit should be instituted thereon, an allegation in an answer, that such stipulation was intended to enable the plaintiff to receive usurious rates of interest on the note was relevant and pertinent, as tending to constitute a defence as to a part of the plaintiff's claim, and it was therefore error, whether the matter was well pleaded or not, to strike such allegation out on motion; and where, by such striking out, the defendant was deprived of the right, which he otherwise would have had, to introduce evidence of the fact so alleged, such error could not be regarded as harmless.

Id.

3. *Payment.*—The giving of a promissory note governed by the law merchant for a pre-existing indebtedness of the maker to the payee will discharge the debt, unless it be shown that the parties did not intend it to have that effect; but the giving of a promissory note not governed by the law merchant for such a debt does not operate as a payment thereof, unless it be so expressly stipulated between the parties.

Alford et al. v. Baker et al., 279

4. *Same.*—Where one seeks to avoid the payment of a debt on the

ground that he has given his promissory note for it, which has matured, and which he has not paid, he must show affirmatively that by stipulation the note was to be received as payment, or that it was of such a character as to carry with it the legal inference that it was thus received. *Ib.*

5. *Payable in Another State.—Presumption as to Law of Another State.*—The courts of this State will presume, in the absence of proof to the contrary, that a promissory note made payable in another state is governed by the common law, and not by the law merchant. *Ib.*
6. *Suit on Indorsement.—Insolvency of Maker.*—Where the maker of a promissory note, which was indorsed after its maturity by the payee to a third person, was insolvent at the time of such indorsement, and so continued, it was not necessary for the indorsee to sue the maker before suing upon the indorsement, though the maker was solvent at the maturity of the note. *Kestner v. Spath et al.*, 288
7. *Pleading.—Notice to Indorser.*—A complaint upon a promissory note against an indorser, which shows that by the statute of the state in which it was payable it was negotiable as an inland bill of exchange according to the law merchant, but does not allege notice of dishonor to the indorser, is bad on demurrer. *Ford v. Booker et al.*, 395
8. *Payable in Bank.*—To give the character of commercial paper to a promissory note, under sec. 6, 1 Rev. Stat. 1876, p. 636, it is not necessary that the bank in which it is made payable shall be a national bank or a chartered bank. *Reed v. Trentman et al.*, 438
9. *Accommodation' Paper.—Application to Particular Purpose.*—That the application of commercial paper to a purpose other than that for which it was executed by an accommodation party may constitute a good defence thereto as to such party, he must have an interest in its application to the particular purpose for which he executed it; and in an action on a promissory note governed by the law merchant by an indorsee against the maker, it could not constitute a good defence, that the defendant executed the note as an accommodation note only, upon an agreement between him and the payee that it should be sold to the bank at which it was payable, and not otherwise, and that the payee sold and transferred it to the plaintiff, not said bank, the plaintiff taking the assignment with knowledge of all the facts. *Ib.*

PROXIMATE CAUSE.

See CRIMINAL LAW, 8, 9; LIQUOR LAW, 5.

RAILROAD.

1. *Receiver.—Injury to Person.—Pleading.*—To a complaint against a railroad company for injuries received by the plaintiff in being run over by a train of cars of the defendant, it is a sufficient answer that, when the injuries were inflicted on the plaintiff, the railroad, engines, cars and all other property of the company were in the hands and under the control of a receiver duly appointed and acting; and such answer need not set forth a copy of the order of court appointing the receiver. *Bell v. The I., C. & L. R. R. Co.*, 57
2. *Injury to Person.—Pleading.*—A paragraph of complaint by an administrator against a railroad company charging gross negligence in the construction of a crossing of the railroad over a certain public highway, and that such negligent and defective construction of said crossing caused injuries, which resulted in the death of the plaintiff's intestate, was held sufficient; and another paragraph of said complaint, charging negligence in the construction of the railroad at said crossing, and

to the guilt or innocence of the defendant, and, such alleged misconduct being controverted, the evidence, either oral or written, offered on this point to the court in connection with the motion, is conflicting, the question of such alleged misconduct should be determined upon the weight of the evidence; and the Supreme Court will respect the conclusion arrived at, as it does the decision of a question of fact upon conflicting evidence in a civil action. *Holloway v. The State*, 554

12. *Application for, When and How Made.*—An application for a new trial in a civil action cannot be made except by motion, upon written cause filed at the time of making the motion, and the application must be made at the term at which the verdict or decision is rendered, except it be for cause discovered afterwards; and the court cannot, without the agreement or waiver of the parties, grant time beyond the term to make the application, for a cause other than one discovered afterwards. But when a trial is pending at the close of the term, the court may proceed with it until it is concluded, and the additional time thus required will be held to be within the legal term.

Krutz v. Craig, Adm'x, 561

NUISANCE.

See LANDLORD AND TENANT, 1.

OFFICE AND OFFICER.

See SHERIFF.

Profit Derived by Officer from Public Money in his Custody.—In this State, a public officer, as a county treasurer, who has received public money, with the custody of which he is charged by virtue of his office, in the absence of a statute providing that the ownership of the specific money shall remain in the public, is not, like a trustee or an agent, the mere bailee or custodian of such money, but it becomes his own money, and he can only be required to account for it and pay it over as provided by law and by the terms of his official bond, and cannot be required to account for and pay over amounts collected or received by him as interest on such money loaned to or deposited with a bank.

Shelton v. The State, ex rel. The B'd of Comm'rs of Morgan Co. et al., 331

OFFICIAL BOND.

See COUNTY TREASURER; PLEADING, 7; SHERIFF.

Liability of Surety.—County Auditor.—A county auditor, as such, fraudulently issued an order, payable to himself, on the county treasurer, for a balance of fees falsely pretended therein to have been allowed him as auditor by the board of county commissioners, and presented it to said treasurer, who indorsed it, "Not paid for want of funds." And said auditor afterwards presented it to a bank, which, in good faith, relying on the genuineness of the order, and without notice of its fraudulent character, advanced money to the auditor upon the deposit of said order as security therefor, which money becoming due and being unpaid, the bank demanded of said treasurer payment of said order, which he refused.

Held, in an action, brought by said bank as relator, upon the official bond of said auditor, conditioned for the faithful and impartial discharge of the duties of his office according to law, that the act which resulted in damage to the relator, being the presentation to it of the order and the obtaining of said money thereby, was not an official act, and the sureties on said bond were not liable for said damage. WORDEN and PETTIT, JJ., dissented.

The State, ex rel., etc., v. Kent et al., 112

PARTIES.

1. *Demurrer.—Answer.—Promissory Note Assigned Without Endorsement.*—Where a promissory note has been assigned, but not by endorsement, the payee should be made a party defendant in an action on the note by the assignee; but if the payee be not made a party, objection to such defect of parties apparent on the face of the complaint cannot be taken by demurrer assigning insufficiency of the facts stated or by answer, but must be taken by demurrer assigning defect of parties defendants. *Clough et al. v. Thomas et al.*, 24
2. *Petition to be Made a Party.*—Where such a defect of parties was apparent on the face of a complaint on a promissory note, and objection thereto was not properly taken by the defendant, it was error to refuse to permit the payee to become a party upon her petition alleging that the note was executed to her, that she had been and still was the owner thereof, and that it had been transferred by her husband without authority from her, she being at the time a minor and a married woman. *Ib.*
3. *Rule of Court.*—The fact that such an application to be admitted as a party was made too late under a rule of court could not affect the application, the petitioner not being a party. *Ib.*
4. *Decedents' Estates.—Administration.*—The widow of a deceased payee of a promissory note, the other heirs having assigned said note by indorsement to her, there being no debts of the decedent to be paid, and the estate having been settled without administration, may maintain an action in her own name on said note. *Mitchell v. Dickson et al.*, 110

PARTITION.

See REVIEW OF JUDGMENT, 3.

PARTNERSHIP.

See CONTRACT, 5.

1. *Real Estate.*—In order that real estate purchased by partners may be treated as not subject to sale as real estate to satisfy the personal debt of one of the partners during the continuance of the partnership and until all partnership debts have been paid, it must have been purchased for partnership purposes. *Morgan et al. v. Olvey et ux.*, 6
2. *Suit Against Surviving Partner by Personal Representative of Deceased Partner.*—A complaint by the administrator of the estate of a deceased partner, against the surviving partner, to recover the value of assets of the partnership, which the defendant has refused to account for, misapplied and converted to his own use, should contain proper traversable averments that the partnership debts have been paid, that the affairs of the partnership have been finally settled, and that the shares of the partners have been ascertained, and should show a demand made, or a proper excuse for not making a demand, before the bringing of the action. *Krutz v. Craig, Adm'x*, 561

PATENT.

1. *State Legislation.*—No state legislation should be so construed as to interfere with the enjoyment of property in inventions, as secured by letters-patent of the United States, or to annex conditions to such a grant. *The Grover & Baker Sewing Machine Co. v. Butler*, 454
2. *Act Respecting Foreign Corporations and their Agents.*—The provisions of the act "respecting foreign corporations and their agents in this State" (1 Rev. Stat. 1876, p. 373) do not apply to a foreign corporation which is the owner, either as patentee or as assignee, of letters-patent issued by the United States, or to its agents in this State, in its

transactions in this State, connected with the manufacture, use or sale of the invention described in such letters-patent. *Id.*

PAYMENT.

See HUSBAND AND WIFE, 5, 6, 7; PLEADING, 4, 10; PROMISSORY NOTE, 3, 4; *Compulsory Payment.* See SHERIFF.

PLEADING.

See CONTRACT, 3; CORPORATION, 7, 8; COUNTY TREASURER; DAMAGES; DECEDENTS' ESTATES, 1, 2; DEMURRER; EVIDENCE, 1, 9; FRAUD, 3, 4, 5; HIGHWAY; HUSBAND AND WIFE, 1; INJUNCTION, 2; INSURANCE, 2; JUSTICE OF THE PEACE, 1, 2; LIBEL, 1; NEGLIGENCE, 4; PARTIES, 1; PROMISSORY NOTE, 2, 7; RAILROAD, 1, 2; REAL ESTATE, ACTION TO RECOVER, 3; REVIEW OF JUDGMENT, 1, 2, 5, 6; SET-OFF, 1, 2; SUPREME COURT, 3.

1. *Immaterial Matter.*—A complaint in which facts constituting a cause of action have been alleged cannot be made stronger by an averment that the defendant represented the facts to be as so alleged, and such an averment may be struck out as immaterial on motion.

Evans v. White, Adm'r, 1

2. *Duplicity.*—Material matter which renders a pleading double should be struck out on motion. *Id.*

3. *Departure.*—Complaint for money paid, laid out and expended by the plaintiff for the defendant, at his special instance and request, a bill of particulars filed with the complaint being an account for a certain amount of corn purchased at a certain price.

Held, that a reply claiming for money paid by the plaintiff to satisfy a purchaser for a contemplated non-performance of a contract for the delivery of corn by the defendant to such purchaser was not a departure.

Godman et al. v. Meixsel et al., 11

4. *Action on Judgment.—Answer.—Payment.—Collaterals.*—In an action upon a judgment, under a general answer of payment, proof may be made that the plaintiff has received the amount of certain collaterals placed in his hands, or that he has become chargeable therewith, as payment on the judgment; and, therefore, in such an action, there is no error in striking out of a paragraph of answer such special matter of defence, or in sustaining a demurrer to a paragraph of answer which relies thereon, where there remains such a general answer of payment.

Wolcott v. Ensign, 70

5. *Striking Out Pleading.*—There is no error in striking out a paragraph of answer, when all the evidence admissible thereunder may be given under a remaining paragraph. *Vawter v. Franklin College, 88*

6. *Action to Recover Possession of Real Property.—Answer.—Cross Complaint.*—Where, to a complaint for the recovery of the possession of real estate, there is an answer of general denial, there can be no error in striking out or sustaining a demurrer to another paragraph of answer alleging only matter of defence, every defence, whether legal or equitable, being admissible in evidence under such denial; but the specific performance of a parol contract for the sale and conveyance of said real estate, made between the plaintiff's grantor, he being the owner thereof, and the defendant, and partly performed by said grantor's putting the defendant in possession of the real estate, the making of valuable and lasting improvements thereon by the defendant, and his performance of the consideration, the plaintiff, with knowledge of said contract, having afterwards received his deed of conveyance of said real estate from said grantor, cannot be obtained, and the defendant's title cannot be quieted, under such answer of denial; but such affirmative

relief may be granted under a special answer and cross complaint alleging such facts, and proof thereof. *Emily v. Harding*, 102

7. *Statute Containing Exception or Condition.—Suit on Constable's Bond.*—A complaint on the official bond of a constable, under section 9 of the act in relation to constables, 2 G. & H. 617, for his failure to do his duty in making a levy of an execution as required by the sixth clause of section 3 of said act, which does not allege that property could be found by the constable on which to make a levy, or that the constable was not directed by the plaintiff or his agent not to make a levy, is insufficient. *Montgomery et al. v. The State, ex rel. Southard*, 108
8. *Striking Out Pleading.*—Complaint for the value of goods sold and delivered by the plaintiff to the defendant. Answer, that there was a defect of parties, in that the plaintiff had no interest in the cause of action; that said goods were sold by the plaintiff to a third person named, and by him to the defendant; and that the defendant never purchased of the plaintiff any portion of said goods.
Held, that there was no error in striking out this answer on motion, there being an answer of general denial remaining. *Marshall v. Beeber*, 119
9. *General Denial.—Estoppel.*—Where, in an action brought by an assignee, on a note not payable in bank, executed by two persons, one of the makers answered fraud and want and failure of consideration, and there was a reply of the general denial only, the defendant pleading such answer could not be debarred from setting up such defences by the fact that, after the execution of said note, he being surety thereon, he used and appropriated another note received by him or his principal, in consideration of said note sued on, by indorsing and delivering said other note to a bank, in payment of another note of said principal held by the bank, on which said surety was indorser, and thus carried out the original intention of the parties to the note in suit, and availed himself of all its advantages to him. *Woodward v. Begue*, 176
10. *Payment.—Special Finding.*—Where, in an action upon a money demand on contract, there has been no answer of payment, the court, in its conclusions of law upon a special finding of the facts showing partial payment, cannot allow such payment.
The Town of Cicero v. Clifford et al., 191
11. *Exhibits.*—Where a written instrument, made an exhibit to a complaint, does not constitute the foundation of the action, it cannot supply necessary averments of the complaint, or be noticed as a part thereof.
Watkins v. Brunt et al., 208
12. *Answer.*—A paragraph of pleading filed by a defendant cannot be regarded both as a pleading alleging a defence and as a pleading seeking affirmative relief.
McMannus et al. v. Smith, 211
13. *Counter-Claim.—Action for Recovery of Real Property.*—In an action for the recovery of the possession of real estate, a pleading filed by the defendant alleged that he was the owner in fee simple of the real estate, describing it, and that the plaintiff was claiming and pretending to hold some interest therein as heir-at-law of a person named, and was endeavoring to dispossess the defendant, which claim was a cloud upon his title. Prayer, that the defendant's title be quieted and that the plaintiff be enjoined from setting up his claim.
Held, that this pleading was a counter-claim, and was sufficient to authorize the relief sought. *Ib.*
14. *Pleading Title.—Fee Simple.*—In pleading title in fee simple, it is only necessary to simply state it, without alleging its derivation; and if a party pleading such title, in alleging his chain of title, leaves some of the links blank, this will not vitiate his pleading. *Ib.*
15. *Variance and Amendment.—Promissory Note.*—Where a complaint on a promissory note alleges it to be payable at a certain period after date,

and the copy of the note filed with the complaint shows it to be payable at a certain other period after date, the pleading may be regarded as amended so as to avoid the variance. *Carver v. Carver*, 241

16. *Reformation of Written Instrument. — Mortgage.* — A mortgage of real estate could not be reformed as to the description of the mortgaged premises, and foreclosed as reformed, upon a complaint, which, proceeding as upon the mortgage as executed, afterward merely alleged "said premises" to be a tract, the description of which was given, differing from the description in the mortgage, and asked that the mortgage might be reformed to correspond with the latter description.
Barnaby et al. v. Parker, 271
17. *Injury or Death from Wrongful Act or Omission.* — A complaint for the death of a person caused by the wrongful act or omission of the defendant is bad on demurrer, if it is not alleged therein that the person killed was not guilty of negligence contributing to his injury, or that he was without fault, and the facts alleged do not show that he was not guilty of such negligence, and it is not alleged that the defendant caused the injury wilfully or purposely, though it be alleged that the defendant inflicted the injury recklessly and with gross negligence.
The C. & M. R. R. Co. v. Eaton, Adm'r, 307
18. *Demand.* — In an action upon a written contract for the payment of money at a time and place specified therein, the complaint will not be rendered bad on demurrer by a failure to allege therein a special demand of payment made upon the promisor before the commencement of the action. *Higert v. The Trustees of Ind. Asbury University*, 326
19. *Allegation that Claim Remains Unpaid.* — In an action upon a written agreement to pay money, it must appear from the complaint that the sum demanded remains unpaid; but in a complaint upon a subscription of money to the building fund of a college, this requirement was sufficiently complied with by an allegation that, "though often requested, the defendant has failed and refused and still fails and refuses to pay the same or any part thereof." *Id.*
20. *Counter-Claim.* — Where it appears from the facts alleged in an answer that it contains a statement of new matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the defendant, this need not also be directly averred, to constitute a counter-claim.
Gilpin v. Wilson, 443
21. *Same. — Action to Recover Real Estate. — Sheriff's Sale. — Counter-Claim. — Demurrer.* — Action for the recovery of the possession of real estate. Answer by way of counter-claim, seeking to quiet the defendant's title to said real estate, by setting aside a sale thereof made to the plaintiff by the sheriff under an execution issued on a judgment in favor of the plaintiff against the defendant, it being alleged that before said sale the defendant pointed out and surrendered to the officer who held said execution for collection personal property to be levied on and sold by him under the execution, of a certain value, and sufficient to satisfy the execution, which the plaintiff knew, but that said officer, confederating with the plaintiff to injure the defendant, refused and neglected to accept said personal property, and, in lieu thereof, without the knowledge or consent of the defendant, levied on and sold for a certain sum to the plaintiff the real estate in question, under said execution; that said real estate consisted of a farm of a certain number of acres; that it was susceptible of division into, etc., several portions, each of which was worth more than said sum bid by the plaintiff, and more than sufficient to satisfy said execution; but that said officer, confederating with the plaintiff as aforesaid, advertised the whole tract for sale and sold it as a whole, as aforesaid, without offering it in the subdivisions into which it was divisible as aforesaid; and the defendant offered to

pay the purchase-money and ten per cent. interest thereon and all costs, or such sum as the court might find due to the plaintiff.

Held, that it was not necessary to make an exhibit of the judgment, etc., on which the sale was made.

Held, also, that the answer was good on demurrer.

Held, also, that if the facts alleged in the counter-claim might have been given in evidence under the general denial, which was also pleaded, yet the sustaining of a demurrer to the counter-claim was an available error. *Ib.*

22. *Demurrer.—Form of Action.*—If a complaint states any cause of action in favor of the plaintiff against the defendant, it will be held good on demurrer assigning want of sufficient facts, without regard to the question as to what the form of action would have been at common law.

Grose v. Dickerson, 460

23. *Same.—General Denial.*—There can be no available error in sustaining a demurrer to a paragraph of answer, where every purpose it could accomplish is served by a remaining paragraph of general denial. *Ib.*

24. *Set-Off.—Tort.*—An answer of set-off pleaded to a complaint in tort is bad on demurrer. *Ib.*

25. *Demurrer.—Waiver.*—Where a plaintiff replies to a paragraph of answer, after the sustaining of a demurrer thereto filed by him, and, the demurrer being thus waived, the defendant has the full benefit of such paragraph, he cannot complain of the ruling on the demurrer. *Ib.*

26. *Performance.*—Where a pleading is based upon an agreement, either as a cause of action or as matter of defence, performance or a sufficient excuse for non-performance of the stipulations to be performed by the party so relying on the agreement must be averred.

Armstrong et al. v. Rockwood, 506

POWER.

See VENDOR AND PURCHASER, 4.

PRACTICE.

See ARREST OF JUDGMENT; BILL OF EXCEPTIONS; CONTINUANCE; DEMURRER; GUARDIAN AND WARD, 1; INJUNCTION, 1; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JURISDICTION; PROMISSORY NOTE, 2; REVIEW OF JUDGMENT; SUPREME COURT; U. S. COURT, REMOVAL OF CAUSE TO.

1. *Continuance.*—Where the court has improperly refused to grant a continuance, the ruling must be made a ground of a motion for a new trial, in order to present the question to this court, and then it must be done by assigning as error the overruling of the motion for a new trial.

Arbuckle et al. v. McCoy, 63

2. *Substituted Papers.—Clerk.*—Authority to order or allow the filing of substituted papers belongs, not to the clerk, but to the court.

Everett v. Gooding, 72

3. *Judgment on Special Finding, Notwithstanding General Verdict.*—Special findings in answer to interrogatories override the general verdict only when both cannot stand; and the Supreme Court will not direct judgment in favor of a party against whom the general verdict has been rendered, unless this antagonism is apparent on the face of the record, and the special finding cannot, by any hypothesis, be reconciled with the general verdict. *The I. & St. L. R. R. Co. v. Stout, Adm'r*, 143

4. *Same.—Construction of Section 337 of the Code.*—The inconsistency contemplated by section 337 of the code, because of which the special finding shall control the general verdict, is the inconsistency of the special finding of facts, taken as a whole, with the general verdict, or the

- exclusion, by the facts found in one or more of the answers to interrogatories, of every conclusion that will authorize the general verdict. *Ib.*
5. *New Trial.—Evidence.—Special Finding.*—A new trial will be granted for want of evidence to support a special finding of facts by the jury in answer to interrogatories, only when it would be granted for insufficiency of the evidence to support the general verdict. *Ib.*
 6. *Venire De Novo.*—Where a verdict is certain, responsive to the issues, and decides the whole case, a motion for a *venire de novo* will not be sustained. *Woodward v. Begue, 176*
 7. *Offer to Confess Judgment.*—Before the trial of a pending action, the defendant offered in writing “to confess judgment for” a certain sum, “with costs accrued to the present time” in said cause; and the plaintiff declined to accept said offer, and on the trial there was a finding for the plaintiff for a smaller sum.
Held, that said offer was sufficient, and that the judgment was properly rendered for the amount of the finding with costs accrued up to and including the day on which said offer was made. *Rose v. Grinstead, 202*
 8. *Trial in Absence of Defendant.*—Where a cause at issue has been reached for trial, and the defendant and his attorney are absent, it may be submitted to the court for trial of the issues joined, without the intervention of a jury, without calling the defendant.
The Indianapolis Piano Manuf'g Co. et al. v. Caven, 258
 9. *Same.—Relief from Neglect, etc.*—Prior to the adjournment of a court for a holiday recess, an attorney for the defendant in a cause, which he knew was the next cause for trial, informed the court, in the hearing of the plaintiff's counsel, that he would be absent during the recess, and could not return until an hour after the usual time for the meeting of the court; and upon the meeting of the court, pursuant to adjournment, the defendant and his attorney being absent, the court required that said cause be tried or passed; and the plaintiff's attorney having notified the resident partner of said defendant's attorney that said cause had been called for trial, and said partner, who, as was afterwards shown, was not prepared in said cause, having refused to appear, the plaintiff's attorney submitted the cause to the court for trial; and said defendant's attorney, upon his arrival at the hour so announced by him, found that the cause had been tried, and that a finding had been rendered for the plaintiff.
Held, upon affidavits showing these facts and a partial defence, that the defendant was not entitled to any relief. *Ib.*

PRESUMPTION.

See FORMER ADJUDICATION; PROMISSORY NOTE, 5; SUPREME COURT, 12.

PRINCIPAL AND AGENT.

See CANAL, 4; CONTRACT, 1; EVIDENCE, 3; HUSBAND AND WIFE, 3, 6; INSURANCE, 5.

1. *Special Agent.—Authority to Sign Note.*—Where a person authorizes another to sign the name of the former to a promissory note for a specified sum, the payee will be charged with knowledge of the extent of such authority, and the person conferring it cannot be bound for a larger sum. *Blackwell v. Ketcham, 184*
2. *Attorney.—Ratification.*—An account having been placed in the hands of an attorney by the creditor for collection, and the attorney having presented it to the debtor for payment, the debtor afterwards paid a part of the claim to another person who occupied the same office with said attorney, and who gave a receipt for the money so paid, signed by him as for said attorney, but who had no business connection with said

attorney, and had no authority from him or from said creditor to receive said payment, which act was not ratified by said creditor, but was ratified by his said attorney, who never received the money so paid, and who afterwards repudiated said act, on learning that his client had never received the money so paid.

Held, in an action on said account, that the creditor was not bound by said payment. *O'Conner v. Arnold et al.*, 203

3. *Real Estate Broker*.—Where an owner of certain real estate agreed with a broker, that if the latter would "find a purchaser, or make a sale of said real estate," said owner would pay said broker, for his commission, a certain sum; and, in pursuance of said agreement, the broker effected a bargain and sale of said real estate, by a contract which was mutually obligatory on said owner as vendor and a third person as vendee, the broker was entitled to said commission, though the vendee afterwards refused to execute his part of said contract of sale.

Love et al. v. Miller et al., 294

PRINCIPAL AND SURETY.

See COUNTY TREASURER; OFFICIAL BOND; SHERIFF.

1. *Extension of Time of Stay of Execution*.—*Appeal Bond*.—*Burden of Proof*.—Upon an appeal from a justice of the peace by the defendant, judgment was rendered against the defendant for a certain sum, being more than five dollars less than the amount of the judgment rendered against him by the justice, and, including costs, which were adjudged against the defendant, less than one hundred dollars, it being further adjudged that execution should not issue until the expiration of six months, said judgment being rendered by agreement of parties, without the knowledge or consent of the surety on the appeal bond.

Held, that such extension of the time of stay of execution discharged said surety.

Held, also, in an action on said appeal bond, the surety relying on such defence, that the burden of proving that he had notice of said extension and consented thereto was upon the plaintiff. *Wingate v. Wilson*, 78

2. *Guardian's Bond*.—In an action on a guardian's bond, it is not a sufficient defence for a surety, that he signed the bond on the express condition that the principal obligor, before delivering it to the clerk, would have it signed by one or more other good, solvent men, as sureties with him, which was not done.

Hunt et al. v. The State, ex rel. Martin et ux., 321

3. *Same*.—*Fraud*.—*Pleading*.—In such an action, an answer by a sole surety is insufficient, which alleges that the bond was obtained from him by the principal obligor by fraud, covin and misrepresentation, by his stating that it should not be delivered to the clerk or to the judge, until it was executed by one or two other good, solvent persons as sureties. *Ib.*

4. *Extension of Time of Payment*.—*Alteration of Written Instrument*.—Where, by agreement between the maker and payee of a promissory note bearing eight per cent. interest, without the knowledge or consent of a surety thereon, in consideration that the payee would extend the time for the payment of the note for an indefinite period after its maturity, until he should demand payment, the maker endorsed on the note the following: "I hereby agree to pay ten per cent. interest on this note hereafter," dated the day before the maturity of the note, and signed by the maker; and, in pursuance of the agreement, the payee did extend the time for a long period after the maturity of the note;

Held, that the new contract, viewed as a contract for the extension of time, did not discharge the surety.

Held, also (BIDDLE, J., dissenting), that said agreement endorsed on the

note was not a merger and abrogation of the contract contained in the note in respect to the payment of interest, or such an alteration of the original contract as would discharge the surety in an action on the original contract. *Bucklen v. Huff*, 474

5. *Alteration of Note.—Spoliation.—Negligence of Payee.*—Where, a short time before the maturity of a promissory note bearing eight per cent. interest, the payee required the payment of ten per cent. interest for such time as the note should run after maturity; and the maker thereupon altered said note, so as to make it stipulate that it should bear interest at the rate of ten per cent., instead of eight per cent.; and the payee, being unable to write or read writing, and having no knowledge of the alteration thus made, and not assenting thereto, received the note again from the maker and retained it after maturity, receiving from the maker the increased rate of interest, without knowledge of said alteration or assent thereto;

Held, that the alteration was a mere spoliation of the note, and did not affect the payee's right to recover on the note as it existed before the spoliation, against a surety thereon, and the payee could not be regarded as guilty of such negligence as would deprive him of such right to recover. *Ib.*

6. *Notice of Surety Requiring the Institution of Suit.*—A surety upon a contract in writing, on which the right of action has accrued, cannot avail himself of the remedy provided by sections 672 and 673 of our code of practice, by giving notice in writing to an attorney of the creditor or obligee directing such attorney forthwith to institute an action upon the contract.

Driskill v. The Board of Commissioners of Washington Co., 532

PROMISSORY NOTE.

See CONSIDERATION, 1; CONTRACT, 2, 3; EVIDENCE, 6; HUSBAND AND WIFE, 4 to 7; PARTIES, 1, 2; PLEADING, 15; PRINCIPAL AND SURETY, 4, 5.

1. *Payable in Bank.—Locality of Bank Not Stated.*—Where a promissory note is made in this State, payable at a bank named, the locality of the bank not being stated, in an action on the note in a court of this State, the bank will be presumed to be located in this State, unless the contrary appears, and, therefore, on demurrer to the complaint, the note will be regarded as negotiable by the law merchant.

The Indianapolis Piano Manufacturing Co. et al. v. Caven, 258

2. *Pleading.—Striking Out Relevant Matter.*—In an action on a promissory note stipulating for ten per cent. attorney's fees if suit should be instituted thereon, an allegation in an answer, that such stipulation was intended to enable the plaintiff to receive usurious rates of interest on the note was relevant and pertinent, as tending to constitute a defence as to a part of the plaintiff's claim, and it was therefore error, whether the matter was well pleaded or not, to strike such allegation out on motion; and where, by such striking out, the defendant was deprived of the right, which he otherwise would have had, to introduce evidence of the fact so alleged, such error could not be regarded as harmless. *Ib.*

3. *Payment.*—The giving of a promissory note governed by the law merchant for a pre-existing indebtedness of the maker to the payee will discharge the debt, unless it be shown that the parties did not intend it to have that effect; but the giving of a promissory note not governed by the law merchant for such a debt does not operate as a payment thereof, unless it be so expressly stipulated between the parties. *Alford et al. v. Baker et al.*, 279

4. *Same.*—Where one seeks to avoid the payment of a debt on the

ground that he has given his promissory note for it, which has matured, and which he has not paid, he must show affirmatively that by stipulation the note was to be received as payment, or that it was of such a character as to carry with it the legal inference that it was thus received. *Ib.*

5. *Payable in Another State.—Presumption as to Law of Another State.*—The courts of this State will presume, in the absence of proof to the contrary, that a promissory note made payable in another state is governed by the common law, and not by the law merchant. *Ib.*
6. *Suit on Indorsement.—Insolvency of Maker.*—Where the maker of a promissory note, which was indorsed after its maturity by the payee to a third person, was insolvent at the time of such indorsement, and so continued, it was not necessary for the indorsee to sue the maker before suing upon the indorsement, though the maker was solvent at the maturity of the note. *Kestner v. Spath et al.*, 288
7. *Pleading.—Notice to Indorser.*—A complaint upon a promissory note against an indorser, which shows that by the statute of the state in which it was payable it was negotiable as an inland bill of exchange according to the law merchant, but does not allege notice of dishonor to the indorser, is bad on demurrer. *Ford v. Booker et al.*, 395
8. *Payable in Bank.*—To give the character of commercial paper to a promissory note, under sec. 6, 1 Rev. Stat. 1876, p. 636, it is not necessary that the bank in which it is made payable shall be a national bank or a chartered bank. *Reed v. Trentman et al.*, 438
9. *Accommodation' Paper.—Application to Particular Purpose.*—That the application of commercial paper to a purpose other than that for which it was executed by an accommodation party may constitute a good defence thereto as to such party, he must have an interest in its application to the particular purpose for which he executed it; and in an action on a promissory note governed by the law merchant by an indorsee against the maker, it could not constitute a good defence, that the defendant executed the note as an accommodation note only, upon an agreement between him and the payee that it should be sold to the bank at which it was payable, and not otherwise, and that the payee sold and transferred it to the plaintiff, not said bank, the plaintiff taking the assignment with knowledge of all the facts. *Ib.*

PROXIMATE CAUSE.

See CRIMINAL LAW, 8, 9; LIQUOR LAW, 5.

RAILROAD.

1. *Receiver.—Injury to Person.—Pleading.*—To a complaint against a railroad company for injuries received by the plaintiff in being run over by a train of cars of the defendant, it is a sufficient answer that, when the injuries were inflicted on the plaintiff, the railroad, engines, cars and all other property of the company were in the hands and under the control of a receiver duly appointed and acting; and such answer need not set forth a copy of the order of court appointing the receiver. *Bell v. The I., C. & L. R. R. Co.*, 57
2. *Injury to Person.—Pleading.*—A paragraph of complaint by an administrator against a railroad company charging gross negligence in the construction of a crossing of the railroad over a certain public highway, and that such negligent and defective construction of said crossing caused injuries, which resulted in the death of the plaintiff's intestate, was held sufficient; and another paragraph of said complaint, charging negligence in the construction of the railroad at said crossing, and

also in the running of a train on the defendant's road, by which said injuries were caused, was held to be unquestionably good.

I. & St. L. R. R. Co. v. Stout, Adm'r, 143

3. *Ejection of Passenger from Train.*—A person who had purchased of a railroad company, at one of its stations, a first class ticket for passage from said station to another on the railroad of said company, started upon a mixed train, composed of freight and passenger cars, the conductor of which, upon taking up said ticket, gave the passenger a card, on which said conductor had written the number of the station to which said passenger was to be carried, and the initial letters of said conductor's name. At an intermediate station, said passenger left said mixed train and got upon an express train, which there passed said mixed train, and which would arrive at his destination sooner than said mixed train, he having been assured by the conductor of the mixed train that said card would be received by the conductor of the express train, and would be as good as his ticket, and a brakeman on the mixed train, upon reaching said intermediate station, having announced the approach of said express train, and having told the people in the car in which said passenger was, on said mixed train, to get out and go to the station, to be ready to take the express train. The conductor of the express train refused to accept said card, and upon the refusal of said passenger to pay again, caused him to be forcibly put off the train, at night, and not at a station or house; and when said mixed train came along, said passenger was taken upon it and carried to his destination. *Held*, that said passenger was entitled to damages for his said ejection, though said card was merely the private mark of the conductor who gave it, used only by himself, on his own train, for his own convenience; and said passenger, when he purchased his ticket, made no inquiry as to the rules of the company in relation to carrying passengers, and transferred himself from the mixed to the express train without having a stop-off check, such as the company sanctioned; and the conductor of the mixed train had such stop-off checks at the time he gave said card; and the passenger did not call on said conductor for such a check, and refused to pay his fare on the express train or leave said train unless put off by force; and he was taken upon the mixed train in about five minutes after he was so put off, and carried safely to his destination; and the company was not in the habit of carrying passengers from the mixed train, upon the express train, on the private checks of the conductor of the former train, but on the regularly authorized stop-off checks of the company, which represented nothing more than the original ticket represented.

Held, also, that damages in the sum of four hundred dollars were not excessive.

The T., W. & W. R. W. Co. v. McDonough, 289

4. *Killing Live Stock—Evidence.*—In an action against a railroad company to recover for the killing or injuring of live stock by its cars at a point on its track where the track might have been fenced, but was not, the allegation that the track was not fenced must be proved on the trial.

The P., C. & St. L. R. W. Co. v. Hackney, 488

REAL ESTATE, ACTION TO QUIET TITLE.

See MORTGAGE, 3.

REAL ESTATE, ACTION TO RECOVER.

See DESCENT, 1; PLEADING, 6, 13, 14, 21.

1. *Misjoinder of Causes.—Damages.*—In an action for the possession of real estate, mesne profits may be recovered as damages; but damages for waste or injury to the freehold are not incident to such action, and the uniting of a suit therefor with such action is a misjoinder of causes, for which, however, the judgment will not be reversed. *Bottomff v. Wise, 32*

2. *Same.—Former Recovery.*—A complaint, the body of which was in the usual form of a complaint for the recovery of the possession of real estate, demanded judgment for the recovery of the land and a certain sum as damages for the detention thereof, and for injuries and waste committed thereon by the defendant, and for other proper relief.
Held, it not appearing that any objection was raised in said action to the misjoinder, that the recovery of the plaintiff therein might be pleaded in bar of a subsequent action by the same plaintiff against the same defendant for the recovery of the rents and profits of said land accrued, and damages for timber cut and carried away, and for waste committed on said land, prior to the commencement of said former action. *Ib.*
3. *Pleading.—Equitable Title.—Instruction to Jury.*—Where a complaint for the recovery of the possession of real estate is in the usual form of a possessory action, not stating the nature of the plaintiff's title, or where the recovery is sought upon the ground that the plaintiff was insane at the time of the execution of the deed of conveyance under which the defendant claims title, there can be no recovery upon an equitable title; and in such a case, an instruction to the jury treating of the doctrine of trusts was outside of the issues and calculated to mislead the jury, and therefore erroneous. *Nichol v. Thomas*, 42

RECEIPT.

Evidence.—Contract.—A receipt is a written acknowledgment of having received money or a thing of value, without containing any affirmative obligation upon either party to it,—a mere admission of a fact in writing; when it contains stipulations which amount to a contract, it must be governed by the law of contracts, and can be avoided only as contracts are avoided. *Krutz v. Craig, Adm'x*, 561

RECEIVER.

See RAILROAD, 1.

RECOGNIZANCE.

1. *Statute of Frauds.*—A recognizance in a criminal proceeding, taken in open court and entered on the order book, is not within the statute of frauds, but is valid and binding without the signature or seal of any of the cognizors. *Grinestaff et al. v. The State*, 238
2. *Evidence.*—On the trial of an action upon a forfeited recognizance taken in open court and entered on the order book, it is not necessary to prove that the court required the principal to enter into the recognizance. *Ib.*
3. *Fixing Amount.*—No other fixing of the amount of bail than specifying it in the recognizance is necessary, when the recognizance is so taken by the court. *Ib.*

RECORD.

See BILL OF EXCEPTIONS.

1. *Motion for New Trial.*—A motion for a new trial is a part of the record without being embraced in a bill of exceptions. *Nichol v. Thomas*, 42
2. *Bill of Exceptions.*—In the transcript of a record on appeal to the Supreme Court, immediately after the entry of the judgment, which was rendered on a certain day of the term at which the trial was had, was this entry: "And the defendant now presents to the court his bill of exceptions, which is signed by the court and filed, and is as follows." Then followed a bill of exceptions containing the evidence.
Held, that it was shown when the bill was filed, and that it was a part of the record. *Ib.*

REPEAL OF LAWS.

See U. S. COURT, REMOVAL OF CAUSE TO, 2; TURNPIKE, 1, 2.

REPLEVIN BAIL.

See EXECUTION, 1.

RES ADJUDICATA.

See FORMER ADJUDICATION; SUPREME COURT, 6, 7.

REVIEW OF JUDGMENT.

See JURISDICTION, 2.

1. *Pleading.—Complete Record.*—A complaint to review a judgment must set forth a complete record of the former action.
Kitch et al. v. The State, ex rel. Johnson, 59
2. *Exception.*—A complaint to review a judgment for alleged error of the court during the trial must show that in the original action exception to such erroneous ruling was taken by the party seeking to have the judgment reviewed.
Ib.
3. *Partition.—Infancy.*—An infant defendant in a proceeding for the partition of real estate, who is not served with summons notifying him of its pendency, and whose guardian does not attend and approve the partition, he and his guardian having no actual knowledge of the proceeding until after its determination, may not have a review of the partition within one year after the removal of his disability, without showing sufficient cause.
Brown et al. v. Keyser, 85
4. *Appeal.—Final Judgment.*—A judgment in a proceeding to review a former judgment, either granting or refusing the review, puts an end to the action for a review, and is a judgment from which an appeal will lie to the Supreme Court
Ib.
5. *Pleading.*—In an action to review a judgment for error of law appearing in the proceedings and judgment, the complaint should set out a complete record of such judgment, and the error must appear on the face of the record, the truth of which cannot be contradicted by such complaint.
Weathers et al. v. Doerr et al., 104
6. *New Matter.—Pleading.—Diligence.*—A complaint by A. against B. in the circuit court, to review a judgment rendered by the abolished common pleas of the same county, alleged, that A. was duly served with summons to answer B. in a suit on a promissory note alleged to have been made to the latter by the former for a certain sum; that A. did not appear to said suit, because theretofore he had executed a note to B. for a certain greater sum, which was the only note ever executed by A. to B.; and that he never signed the note so sued on or authorized any one to sign it for him, but that it was a forgery, which he did not discover until November, judgment thereon having been rendered against him by default in the previous May, in said court of common pleas, etc.
Held, that the complaint was insufficient. Bryant v. Hoskins et al., 218

RULE OF COURT.

See PARTIES, 3.

SALE.

Sale of Goods by One Not the Owner.—The fact that one has purchased goods from another and received them as the goods of the latter, will not, if,

in fact, they were the property of a third person, relieve such purchaser from liability to pay such third person for said goods.

Marshall v. Beeber et al., 83

SCHOOL FUND.

See COUNTY AUDITOR, 4.

SET-OFF.

1. *Pleading.—Principal and Surety.*—In an action upon a contract against two or more defendants, a claim in favor of one of the defendants cannot be pleaded by him as a set-off, without alleging that he is the principal in said contract and that his co-defendants are sureties therein.
Harris v. Rivers et al., 216
2. *Tort.*—In an action upon a contract, a claim in favor of the defendant against the plaintiff arising out of tort cannot be made a set-off. *Ib.*

SHERIFF.

Liability for Default.—Compulsory Payment.—Execution for Use of Sheriff.—Where a sheriff, by neglecting or refusing to return an execution within the period required by law, has become liable, under section 482 of the code, to the judgment-plaintiff in the amount which he might and should have levied by virtue of the execution, and the judgment-plaintiff has claimed payment of such amount of the sheriff, who has accordingly paid the judgment-plaintiff, such payment is compulsory, within the intent of section 676 of the code, and the judgment on which such execution was issued is not thereby discharged, but remains in force, the lien thereof on real estate unaffected, for the benefit of the sheriff, who is entitled to execution thereon for his use, to reimburse him for the amount he has thus been compelled to pay.

Burbank et al. v. Slinkard et al., 493

SHERIFF'S SALE.

See EVIDENCE, 14; PLEADING, 21.

SPECIAL FINDING.

See PLEADING, 10; PRACTICE, 3, 4, 5.

SPOLIATION.

See PRINCIPAL AND SURETY, 5.

STATUTES, CONSTRUCTION OF.

See CANAL, 2.

STATUTE OF FRAUDS.

See RECOGNIZANCE, 1.

1. *Debt of Another.*—A verbal contract between A. and B. for the payment by the former of an indebtedness of the latter to C. is not within the statute of frauds; and where B. has afterwards been compelled to pay said indebtedness, he may maintain an action on said contract against A.
Crim v. Fitch, 214
2. *Contract to be Performed at Death.*—A contract, which by its terms is to be performed at the death of one of the parties, is not within the provision of the statute of frauds which requires contracts not to be performed within a year from the making thereof to be in writing.
Frost et al. v. Tarr et ux., 390

STATUTE OF LIMITATIONS.

Criminal Law.—Concealment of Crime.—Forgery.—In an indictment charging that the defendant, while trustee of a certain township, falsely, fraudulently and feloniously altered a certain receipt taken by him as such trustee for money by him paid to the person who signed the receipt, out of the funds of the township, and for its benefit, by raising the amount of said receipt, with the felonious intent to defraud said township, it was alleged that the defendant, in his settlement with his successor in said office, for the purpose of concealing said alteration, falsely and fraudulently made his report and annual settlement sheet and account and his record to correspond with said receipt as so altered, by making the entries therein falsely show the payment by him of the amount of money mentioned in said altered receipt as indicated thereby, and then and there and thereby concealed the fact of said crime, whereby it was not discovered until, etc., showing that, by not including the time of the alleged concealment, there was a lapse of less than two years between the commission of the offence and the commencement of the prosecution, but that by including the period of concealment, more than two years intervened.

Held, that the allegation as to concealment was not sufficient, such entries in the public records of the township not being a concealment of the fact of the crime. *The State v. Fries*, 489

SUPREME COURT.

See JUSTICE OF THE PEACE, 1; PRACTICE, 1; REVIEW OF JUDGMENT, 4.

1. *Instructions to Jury.*—The Supreme Court cannot review the action of the court below in giving or refusing an instruction to the jury, where there is no bill of exceptions in the record, and it does not appear that any exception was taken to the ruling of the court below. *Marshall v. Beiber*, 119
2. *Assignment of Error. — Change of Venue. — New Trial.*—The erroneous refusal of a change of venue is a cause for a new trial, and therefore cannot, on appeal to the Supreme Court, constitute the ground of an assignment of error. *Knarr et al. v. Conaway et al.*, 120
3. *Same.—Pleading.—Parties.*—The fact that the parties to an action are not named at the commencement of the complaint will not, on appeal to the Supreme Court, sustain an assignment of error that the complaint does not state facts sufficient to constitute a cause of action. *Ib.*
4. *Same.—Clerk's Certificate to Transcript.—Exhibits.*—Where, on appeal to the Supreme Court by the defendant in an action, the clerk's certificate to the transcript of the record does not show that the transcript contains all the papers filed in the cause, the fact that copies of notes and a mortgage constituting the foundation of the action, which the complaint alleges are filed with it, do not appear in the record, will not support an assignment of error that the complaint does not state facts sufficient to constitute a cause of action. *Ib.*
5. *Appeal in Criminal Case. — Appeal Taken too Late.*—Where, on appeal from a judgment of conviction rendered by a circuit court, in a prosecution for selling intoxicating liquor to a person in the habit of getting intoxicated, the transcript was not filed in the Supreme Court within one year and thirty days after the rendition of the judgment, the appeal was dismissed on motion. *Lichtenfels v. The State*, 161
6. *Second Appeal.*—If a cause be appealed to the Supreme Court, and by that court the judgment be reversed, and the cause be remanded to the court below for a new trial, and a second appeal be taken, it brings up for review and decision nothing but the proceedings subsequent to the reversal; none of the questions which were before the court and decided

on the first appeal can be reheard or re-examined upon the second appeal.

Dodge v. Gaylord et al., 365

7. *Second Trial on Same Facts.—Law of the Case.*—The decision of the Supreme Court, rendered upon a given state of facts, becomes the law of the case as applicable to such facts; and if the cause be remanded for a new trial, the parties have the right to introduce new evidence and establish a new state of facts; and when this is done, said decision ceases to be the law of the case, and the court, in the trial of such case, is not conclusively bound by such decision, but should apply the law applicable to the new and changed state of facts; but if such cause be submitted to the court or jury for a re-trial upon the same identical facts on which said decision was rendered, such decision remains the law of the case, and the trial court must apply the law as laid down by the appellate court to the facts so submitted to the court or jury. *Ib.*
8. *Assignment of Error.—Sufficiency of Complaint.—Amendment of Statute.*—The act of February 25th, 1875 (Acts 1875, Reg. Sess. 111) to amend section 54 of the code, being an amendment of a section which had already been amended, is void; and an objection to the sufficiency of a complaint may be taken for the first time by assignment of error on appeal to the Supreme Court. *Ford v. Booker et al.*, 395
9. *Appeal in Name of Deceased Party.—Motion to Strike Cause from Docket.—Motion to Substitute Name.*—The Supreme Court, having set aside its judgment of reversal in an appeal, upon the petition of the appellee, showing that the person named as appellant had died before the taking of the pretended appeal, overruled a motion to substitute as appellant the name of one to whom said deceased had in his lifetime assigned his interest as plaintiff in the cause of action, and sustained a motion of the appellee to strike the cause from the docket. *Taylor v. Elliott et al.*, 441
10. *Jurisdiction.—Action Commenced Before Mayor.*—The Supreme Court has no jurisdiction of an appeal in an action commenced before the mayor of a city to recover a penalty for a violation of a city ordinance, where the amount in controversy in such appeal, exclusive of interest and costs, does not exceed ten dollars. *Dailey v. The City of Indianapolis*, 483
11. *Form of Judgment.*—A person cannot object to the form of a judgment against him for the first time in the Supreme Court. *McCormick et al. v. Spencer*, 550
12. *Grand Jury.—Presumption.*—The Supreme Court, on appeal in a criminal prosecution by indictment, will presume, where the contrary does not appear, that the grand jury which found the indictment was legally impanelled and sworn. *Holloway v. The State*, 554

TAX.

1. *Congressional Township School Lands Held on Certificate of Sale.*—Congressional township school lands, which have been sold to one who has paid part of the purchase-money, and has received from the county auditor a certificate of purchase entitling him to a conveyance of the land upon full payment of the purchase-money with interest on the unpaid balance thereof, are not subject to taxation as land before such conveyance, and while the title is held merely by such certificate. *Henderson, Auditor of State, v. The State, ex rel. Overman*, 60
2. *Repayment of Illegal Tax.—Auditor of State.—Mandate.*—Where taxes on land, the title of which is so held, have been wrongfully assessed and paid, and said purchaser has presented to the auditor of state a properly authenticated certificate of the board of county commissioners of the county wherein such land is situated, that he has been illegally assessed, and has illegally paid taxes on said land for state, school and sinking fund purposes to a certain amount, which has been duly paid to the treasurer of state, and received into the state treasury, and said purchaser has requested said auditor of state to audit such claim

and issue a warrant to the treasurer of state for the payment thereof, and the auditor of state has refused to comply with such request, he may be required to do so by a writ of mandate. *Ib.*

3. *Delinquency of November Instalment.—Penalty.*—Where a person charged with taxes on a tax duplicate in the hands of a county treasurer has paid one-half of said taxes, on or before the third Monday of April of the year following that for which such taxes are imposed, as provided by section 1 of the act of March 8th, 1873, Acts of 1873, Reg. Sess. 205, the penalty provided by the act of December 21st, 1872, Acts of 1872, Spec. Sess. 57, for delinquent taxes, still attaches to the other half of said taxes, unless said other half be paid on or before the 15th of November following, in the same manner as it attaches to the whole amount charged if none or less than one-half be paid on or before the third Monday of April. Sections 155 and 172 of said act of 1872, are not repealed or amended by said act of 1873, so far as the penalty for the non-payment of said last instalment of the taxes is concerned. (BIDDLE, J., dissented.) *Abbott, Auditor, et al. v. Edgerton, 196*
4. *Collection of Tax on Land, the Owner Having Personally Within the County.—Injunction.*—An injunction will lie at the suit of the owner of land, to prevent the county auditor from advertising it for sale, and the county treasurer from selling it, for the payment of delinquent taxes thereon, while said owner also owns leviable personal property within the county, sufficient to pay said taxes. *Ib.*

TOWN.

See BOND, 1, 2.

TRUST AND TRUSTEE.

See HUSBAND AND WIFE, 7.

TURNPIKE.

1. *Assessments on Land.—Repeal of Statutes.*—By the act of March 13th, 1875, Acts 1875, Reg. Sess., 80, repealing the statutes authorizing the making and collecting of assessments on lands for the construction of plank, macadamized or gravel roads, the remedy for the collection of such an assessment and also the lien or right itself were taken away, and the collection of an assessment already placed upon the tax duplicate at the time of the passage of said repealing act could not be enforced; and the fact that the road had been completed on the faith of such assessment could not affect the operation of the statute. *The Marion Township Gravel Road Co. v. Sleeth, Treas., 35*
2. *Same.—Constitutional Law.*—The general statutes authorizing assessments on lands for the construction of plank, macadamized and gravel roads were not contracts between the State and the companies constructing such roads, and the repeal thereof and the divesting, by the repealing statute, of an acquired lien on land did not violate the provision of the Constitution of the United States prohibiting the states from enacting laws which impair the obligation of contracts. *Ib.*

U. S. COURT, REMOVAL OF CAUSE TO.

1. *Affidavit.*—Under an act of Congress providing for the removal of causes in certain cases from state courts to the circuit court of the United States, and requiring, for that purpose, among other things, the making and filing of an affidavit in the state court by the party seeking the removal, "stating that he has reason to *and does* believe that, from prejudice or local influence, he will not be able to obtain justice in such state court," an affidavit in which the affiant stated, "that

he has reason to believe," etc., omitting the words "and does," was held insufficient.

The B., P. & C. R. W. Co. v. The N. A. & S. R. R. Co. et al., 597

2. *Repeal of Law.—Revised Statutes of United States.*—The act of Congress of March 2d, 1867, amendatory of the act of July 27th, 1866, "for the removal of causes in certain cases from state courts" (14 Stat. at Large, 558), was repealed by the Revised Statutes of the United States approved June 22d, 1874. *Ib.*

UNSOUND MIND.

See REAL ESTATE, ACTION TO RECOVER, 3.

1. *Contract.—Evidence.*—On the trial of an action to set aside a deed of conveyance of real estate on account of the insanity of the grantor, evidence tending to prove his sanity or his insanity, previous or subsequent to the execution of the deed, including the record of a subsequent inquisition by which he was found to be insane, is admissible, as tending to show his mental condition at the time of the making of the contract. *Nichol v. Thomas*, 42
2. *Same.—Disaffirmance.*—A deed of conveyance of real estate executed by an insane person, apparently of sound mind, before office found, is not void, but merely voidable, and vests the title in the grantee, subject to the right of the grantor, upon restoration of his reason, or of his guardian, to affirm or disaffirm the contract. Such disaffirmance must precede the bringing of an action to dispossess the grantee, but such action may be brought without first restoring the consideration to the grantee. *Ib.*

VARIANCE AND AMENDMENT.

See PLEADING, 15.

VENDOR AND PURCHASER.

See MORTGAGE, 3.

1. *Purchase-Money.—Rescission.*—Where, by the terms of a contract for the sale of real estate, it is not provided that the purchaser shall have possession, and the legal title remains in the vendor, to whom a portion of the purchase-money has been paid, and the purchaser, having received possession of the land, has failed to pay an instalment of purchase-money due, and the vendor has by suit recovered possession of the land (which, under such circumstances, he may do), such recovery will not amount to a rescission of the contract or entitle the purchaser to recover the part of the purchase-money paid by him. *Todd v. Collier*, 122
2. *Recording of Deeds.—Subsequent Purchaser.—Subrogation.*—In September, 1856, A. sold and conveyed by warranty deed certain land to B. for a valuable consideration, and said deed was not recorded till November, 1861. B. conveyed, January 23d, 1869, to C., who was not to pay the purchase-money unless he could recover possession of the land by suit. His deed was recorded April 19th, 1869. In March, 1860, the sheriff sold and conveyed said land to D., under a decree of foreclosure and judgment, to which B. was not a party, against A., rendered in 1857, and assigned to D., on a mortgage which was prior in date and lien to said deed of A. to B.; and in April, 1860, A. conveyed said land by quitclaim to D., who, at the time he received said conveyances, had neither actual nor constructive notice of said conveyance to B. In May, 1862, in an action brought by A. against D., said foreclosure sale and said quitclaim were confirmed, and it was decreed that D. was vested with the legal title to said land, and held it in trust for A., and that A. should pay D. a certain sum before the 1st of January, 1864, upon which the title in fee to said land should be vested in

A., discharged of all claims of D., who should then convey to A., or his assigns, by quitclaim, and in default thereof the decree should operate as such conveyance. Afterwards, in March, 1863, E. purchased said decree of D., and D., upon written request of A., entered on the order book following said decree, conveyed said land by quitclaim deed to E., upon payment by him of a certain sum to D., who acknowledged said payment in writing on the order book after said decree, and A. conveyed said land to E. by quitclaim deed, said deeds to E. being duly recorded within ninety days after their date. E., for a valuable consideration, conveyed said land to F. by quitclaim deed, dated July 3d, 1869, and recorded August 17th, 1869. Neither E. nor F., at the time of purchase, had actual notice of the conveyance to B.

Held, in an action by C. against F. to recover possession of said land, that whether the conveyance to D. be regarded as giving him a title in fee simple, or as operating as a mortgage, the conveyance of A. to B. was void as to D. and his grantees.

Held, also, that said decree in said action of A. against D., purchased by E., would, if necessary, be regarded as in force for the protection of E. and his grantees.

Dawkins v. Kions, 164

3. *Incumbrances.—Will.—Discretionary Power of Executor.*—It was provided by a will that the executor named therein, acting upon his best judgment, should sell the real estate of the testator, and convey the same by good and sufficient title to the purchaser. Said executor sold said real estate, without any contract as to incumbrances, and conveyed it by deed without covenant against incumbrances.

Held, that the fact that after said conveyance, taxes, in a certain amount, upon said real estate, being a lien thereon at the time of said sale and conveyance, were paid by the purchaser, to save the real estate from sale therefor, and to remove the incumbrance thereof, constituted no defence to an action against him for purchase-money.

Boaz v. McChesney, 193

4. *Power.—Implied Power.—Delivery of Possession.*—The power to sell and convey implies a power to deliver possession of the property to the purchaser.

The Indiana Central Canal Co. v. The State, 575

5. *Delivery of Key of Premises.*—The delivery of a key by a vendor to a purchaser, at the conclusion of a treaty for the sale of property, is a symbol indicative of the delivery of the possession of the house or premises purchased, to which the key belongs.

Ib.

VENIRE DE NOVO.

See PRACTICE, 6.

VENUE.

See CRIMINAL LAW, 15; SUPREME COURT, 2.

VERDICT.

See CONSIDERATION, 1; INSTRUCTIONS TO JURY, 8; PRACTICE, 6.

VOLUNTARY ASSOCIATION.

See CORPORATION, 1 to 5.

WAIVER.

See EVIDENCE, 9; PLEADING, 25.

WASTE.

Growing Trees.—For a tenant for life to sell and authorize the cutting and

removal of valuable timber trees growing on the land constitutes waste.
Modlin et ux. v. Kennedy et al., 267

WIDOW.

See DESCENT, 1, 2; WITNESS, 1.

WILL.

See CONTRACT, 6; VENDOR AND PURCHASER, 3.

1. *Fee Simple Reduced by Subsequent Clause.*—An estate in fee simple given by a will may, by a subsequent clause of the will, be cut down to a life estate.
Conover et al. v. Stringer, 248
2. *Construction.*—At the time of the execution of a will, and at the death of the testator, he had a wife and three children living, and there were living the widow and children of a deceased son of the testator. In the will, the testator directed that all his property, both real and personal, should be and remain the absolute property of his said wife, if she should be living at the time of his death, except the money that he had on hand and at interest. After certain bequests of such money, he directed that the balance thereof should be divided equally between his lawful heirs, naming as such his said three living children and his said deceased son "or his heirs." He then directed that the balance of his estate, both real and personal, should be equally divided between his "four above named heirs," after the decease of his wife, and that if any of his said heirs should die leaving heirs, they should be entitled to the share of their respective ancestors, as if then living. Suit by said widow of said deceased son for partition of the real estate of the testator, the widow of the testator and the children of said deceased son being dead.
Held, that the petitioner was the owner of one-fourth of said real estate.
Ib.
3. *Construction.—Life Estate.*—A testator in his will directed that the whole of his personal property should be and remain the absolute property of his wife, if she should be living at the time of his decease; and he then directed that all his real estate should be and remain the absolute property of his wife, "as long as she lives."
Held, that, as to the land, the widow took only a life estate.
Modlin et ux. v. Kennedy et al., 267
4. *Marriage.*—The rule of the common law, that the mere marriage of a man, after he has made a will, does not revoke the will, is not changed by statute in this State.
Bowers et al. v. Bowers, 438

WITNESS.

See CONTINUANCE.

1. *Widow.*—On the trial of an action against an administrator for the enforcement of a claim against the estate represented by him, the widow of the decedent is a competent witness to testify to the making of a settlement of the matter in controversy by her husband and the plaintiff in her presence and hearing.
Denbo v. Wright, Adm'r, 226
2. *Administrator.—Incompetent Witness Testifying Without Objection.*—On such a trial, it is error to permit the administrator to testify as a witness in his own behalf, without having been required to testify by the opposite party or by the court; but if he be permitted to so testify without objection or exception on the part of the adverse party, and no motion be made to strike out such evidence, the error will be waived. *Ib.*
3. *Husband and Wife.—Construction of Statute.*—The words "in all cases," in the last sentence of section 18 of the liquor law of 1873 (Acts 1873,

Reg. Sess., p. 151), applied to criminal actions only; and on the trial of an action brought by a married woman, under section 12 of said act, to recover damages sustained by her from the intoxication of her husband, caused by the use of intoxicating liquor sold to him by the defendant, said husband was not a competent witness to testify in behalf of his wife.

Jackson et al. v. Reeves, 231

Ex. J. A. G.

END OF VOLUME LIII.

672 4

